Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

A. DAVID SILVER,

Petitioner,

v.

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, an Indiana corporation, in its individual capacity and as assignee of the SANTA FE PRIVATE EQUITY FUND II, L.P., a New Mexico limited partnership,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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pro se

120 pp

QUESTION PRESENTED

The Court of Appeals below said that jury demands contained in counterclaims are effective only as to issues raised in the counterclaims and are not effective as to original pleadings or to subsequent amended pleadings. Petitioner's jury demand was general. It was attached to his compulsory counterclaim. As of the date of Petitioner's jury demand and for more than six years thereafter the jury demand appeared on the Docket prepared by the Clerk of the District Court. Respondent never moved to strike it. The District Court denied Petitioner's jury demand one month before trial and the Court of Appeals affirmed. Other Circuits, specifically the Second, Third, Fourth, Fifth, Ninth and Tenth, and a prior ruling by the Seventh, would disagree with the decision of the Seventh Circuit in this case. The question presented is:

Whether a Constitutional right to a trial by jury should be granted on all issues triable of right to a jury, if the jury demand is contained in a compulsory counterclaim filed within 10 days of the last pleading (which pleading is a reply, extended by the court, to one count out of several) is filed prior to an amended pleading that alleges RICO claims, seeking statutory damages, is a general demand, is continually on the Docket, is never moved to be stricken, is not prejudicial to respondent, and is never waived.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption of the case contains the names of all the parties who were parties to the proceedings below before the United States Court of Appeals for the Seventh Circuit.

Pursuant to Rule 29.6, petitioner A. David Silver notes that he has no subsidiaries, wholly or partially-owned.

The Lincoln National Life Insurance Company is a wholly-owned subsidiary of Lincoln National Corporation.

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PETITION FOR WRIT FOR CERTIORARI

Petitioner A. David Silver ("Silver") seeks a writ of certiorari to review an opinion and order of the United States Court of Appeals for the Seventh Circuit, which affirmed an order granted by the United States District Court for the Northern District of Illinois against this petitioner.

OPINIONS BELOW

The Order of the Court of Appeals for the Seventh Circuit dated May 15, 1997, is unpublished, and is reprinted in Appendix 1 hereto at App. 1. The Order of the Court of Appeals panel dated June 10, 1997, denying petitioner's petition for rehearing en banc is reprinted as Appendix 2 at App. 13. The Opinion and Order of the United States District Court for the Northern District of Illinois dated September 29, 1995, is reported at 1995 U.S. Dist. LEXIS 14489.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its panel opinion on May 15, 1997. The Court of Appeals granted petitioner's timely filed petition for rehearing en banc. The Court of Appeals denied petitioner's petition for rehearing en banc on June 10,

1997. This petition for a writ of certiorari is being docketed in this Court within 90 days from the Seventh Circuit's June 10, 1997 Order. The Jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

STATEMENT OF THE CASE

On September 23, 1986 the Lincoln National Insurance Company ("Lincoln") filed a complaint against seven defendants. Lincoln filed an amended complaint on September 26, 1986 and a second amended complaint on August 25, 1988. Silver filed a jury demand on June 1, 1987. Lincoln, an Indiana corporation with its principal place of business located in Fort Wayne, Indiana, brought its suit in both its individual capacity and as assignee of Santa Fe Private Equity Fund, L.P. II (SFPEF II), which was a New Mexico limited partnership organized to invest primarily in existing and newly formed health care ventures. Lincoln had invested $900,000 in SFPEF II.

The defendants were:

1. ADS Partners, L.P. (ADSP), also a New Mexico limited partnership which was a general partner of SFPEF II until February, 1987. In February, 1988, it filed a bankruptcy petition in the United States Bankruptcy Court for the District of New Mexico;

2. A. David Silver, the managing general partner of ADSP and a related entity, ADS Associates (ADSA). He resides in Santa Fe, New Mexico where he is an author of books on entrepreneurship and an investment banker. In February 1987, ADSP was removed as general partner of SFPEF II by the limited partners and John Clark was appointed receiver of SFPEF II;

3. Arthur Young & Co. (and four of its employees) which was a Certified Public Accounting partnership with its principal office in New York City. It acted as auditor for Santa Fe Private Equity Fund I, Avant-garde Publishing Corporation/Family Achievement Software Corporation, SFPEF II, ADSA and ADSP;

4. SFPEF II was named as a defendant in Lincoln's original complaint and amended complaint. After SFPEF II was placed in receivership, its receiver assigned to Lincoln all of SFPEF II's claims against Silver and other defendants. Lincoln subsequently amended its amended complaint, dropping SFPEF II as a defendant and asserting claims both individually and as assignee of SFPEF II and ADSA. It allegedly advised Silver and ADSP in organizing SFPEF II and assisted Silver and ADSP in promoting SFPEF II to potential investors. Arthur Young & Co. settled with Lincoln in February, 1990 following its merger with Lincoln's auditors, Ernst & Whinney.

Eventually all defendants named in the second amended complaint were dismissed except Silver and ADSP, the managing general partner of SFPEF II.

Lincoln's second amended complaint was in 23 counts, only twelve of which were tried to the district court. They may be summarized as follows:

In Count I Lincoln, individually, claimed that defendant violated Section 12(2) of the Securities Act of 1993.

In Count III Lincoln, individually, claimed that defendant violated Section 10(b) of the Securities Exchange Act of 1934.

In Count IV Lincoln, individually, claimed that defendants violated Section 5/12 of the Illinois Securities Law of 1953.

In Counts VI and VII Lincoln, individually and as SFPEF II's assignee, claimed that defendants breached fiduciary duties owed under New Mexico Stats. Ann. §§ 54-2-9 and 54-1-21 (A) (1978).

In Counts VIII, IX and X Lincoln, individually, claimed that Silver violated Sections 1962(a), 1962(b) and 1962(c) of the Racketeering Influenced and Corrupt Organizations Act (RICO). 18 U.S.C. §§ 1961 *et seq.*

In Counts XI, XII and XIII Lincoln repeated its claims as assignee of SFPEF II, claiming that Silver violated 18 U.S.C. §§ 1962(a), 1962(b) and 1962(c).

In Count XXI, Lincoln, individually, claimed that Silver engaged in common law fraud.

The trial ran for two weeks and two days commencing August 16, 1993. On September 29, 1995 Judge Nordberg handed down an 80-page Memorandum Opinion and Order. The court found for plaintiff and against defendants on all twelve counts and awarded plaintiff $22,903,788 in damages (representing actual damages of $7,134,556 trebled plus $1,500,000 in punitive damages). The court also held that Lincoln was entitled to reasonable costs and attorney's fees. Final judgment was entered against Silver, including plaintiff's attorney's fees and costs, in the amount of $24,173,864.98.

It is important that this Court see the relevant pages of the Docket, and they are attached hereto at Appendix

8. The critical pleading dates and petitioner's form of representation are the following:

PLEADINGS DATES

RELEVANT DATES	PLEADINGS	SILVER AS *PRO SE* OR REPRESENTED
9/23/86	Lincoln's complaint	pro se
9/26/86	Lincoln's amended complaint	pro se
12/1/86	Silver's answer and motion to dismiss Count IV	Represented
5/21/87	Silver's answer to Count IV	Represented
6/1/87	Silver's counterclaim with jury demand	Represented
8/25/88	Lincoln's second amended complaint (brings in Arthur Young & Co. and RICO)	pro se
10/24/88	Silver's answer to Lincoln's second amended complaint	Represented
10/31/91	Silver's counterclaim denied	pro se
11/16/92	Silver's Memorandum in support of Jury Trial	pro se
7/15/93	Court's ruling for a bench trial; objected to by Silver	pro se
8/16/93	Trial begins	pro se

It is also important to note that the District Court Judge initially assigned to the case was Judge Susan Getzendanner. She was succeeded by District Court Judge John A. Nordberg on September 25, 1987, after Silver's jury demand. The Magistrate Judge initially assigned to the case, Magistrate Gottschall, was succeeded by Magistrate Weisberg on March 10, 1989. Silver's *pro se* time periods aggregated approximately 60 months of the 83 month pre-trial and trial periods. Silver's represented time periods aggregated 23 non-consecutive months, viz:

TIME PERIODS

pro se	9/23/86 - 11/20/86
represented	11/21/86 - 4/21/87
pro se	4/21/87 - 5/8/87
represented	5/8/87 - 4/29/88
pro se	4/29/88 - 9/29/88
represented	9/29/88 - 6/27/89
pro se	6/27/89 - 3/12/90
represented	3/12/90 - 8/20/90
pro se	8/20/90 - to present

The Court of Appeals relied on an untrue statement of respondent and on Page 5, footnote 2 of its Order states that "Silver had been represented by well-known and able counsel for four years, but they never made a jury demand in any answer to plaintiff's complaint or amended complaints, and never requested a jury trial under Rule 39(b) of the Federal Rules of Civil Procedure." (See Appendix 1, at App. 9.) The Court of Appeals erred as to the number of months that Silver was represented by counsel. The Court of Appeals overlooked the fact that

Silver was *pro se* when respondent filed its initial complaint, its first amended complaint and its second amended complaint. The Court of Appeals also overlooked the fact that the Docket cites Silver's June 1, 1987 demand for a jury trial on the cover page, second cover page, and on pages 1, 4, 12 (entry 426), and 13 (entries 431 and 433). (See Docket pages in Appendix 8.) Silver's new counsel, admitted on September 29, 1988, approximately one month after respondent filed its second amended complaint (on which the case was tried), could have demanded a jury trial with its answer filed on October 24, 1988, but according to the Docket, a jury demand had already been made, and quoting a Fifth Circuit ruling, "F&M was entitled to conclude that the district court had recognized and approved its jury demand." *Daniel Intern. Corp. v. Fischbach & Moore, Inc.*, 916 F.2d (5th Cir. 1990), 1061, 1065.

In the same footnote, the Court of Appeals stated that Silver's counsel never requested a jury trial under Rule 39(b). But, was a 39(b) request necessary? Silver acting *pro se* reengaged the Court on his docketed jury demand on November 16, 1992 in the form of a Memorandum in Support of Trial by Jury. The Memorandum was granted by Magistrate Weisberg whose minute order of October 30, 1992 states: "Defendant's request to submit a brief as to why this matter should be determined by a jury as it is currently docketed is granted". (See Docket in Appendix 8, 12.)

The Federal Rules of Civil Procedure set forth the docketing requirements in two places. Rule 79(a) states: "When in an action trial by jury has been properly demanded or ordered, the clerk shall enter the word "jury" on the folio assigned to that issue." Rule 39(a)

states: "When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket to a jury action." Petitioner relied on that entry, as did respondent, whose counsel stated at the July 15, 1993 pre-trial hearing that " . . . we have held in abeyance a lot of our trial preparations until we know whether or not it is going to be a jury or a bench trial", and "Lincoln has not been able to do a lot of its pre-trial preparation until now simply because we are still waiting to find out if it will be a jury or a bench trial." (Appendix 5, App. 35 and App. 39.) Both respondent and petitioner assumed that the clerk's actions under Rule 39(a) with reference to Rule 38, and the clerk's actions under Rule 79(a), procedurally established to the court, both parties and all counsel, that trial by jury had been demanded six years previous under Rule 38. Neither petitioner nor respondent would have been prejudiced by a jury trial.

REASONS FOR GRANTING THE WRIT

I. THE HOLDING OF THE COURT OF APPEALS IN THIS CASE CONFLICTS DIRECTLY WITH THE HOLDING OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN *BENTLER V. BANK OF AMERICA*.

The Court of Appeals for the Seventh Circuit, in denying Silver's appeal states as follows:

> "Silver's argument on appeal that he was improperly denied a jury is predicated on the jury demand contained in his counterclaim filed on June 1, 1987. That jury demand, however, must be deemed effective only as to the issues

raised in his counterclaim, not the issues raised in plaintiff's complaint . . . " (See Appendix 1, at App. 6.)

Silver's counterclaim was compulsory, rather than permissive. It was factually related to respondent's claim. Professor Moore makes the following point:

"If a jury is desired, careful practice, of course dictates that the first line of authority be observed and the demand be made not later than 10 days after the service of the answer so that the question of timely demand will not arise. But we believe that the second line of authority is preferable since it is more direct. The defendant's *compulsory* counterclaim is a part of the defendant's answer, factually related to plaintiff's claims, and realistically the issues are not formulated until the reply has been served. Furthermore, this line of authority adequately achieves the general objective of Rule 38 to have the method of trial settled well in advance of actual trial. Where defendant's counterclaim is permissive, i.e., does not arise out of the transaction or occurrence that is the subject matter of plaintiff's claim, the problem is entirely different. The issues as to plaintiff's claim and defendant's defenses are formulated when the defendant serves its answer, and hence as to those issues a demand for jury should be made not later than 10 days after service of the answer. The first line of authority discussed above necessarily requires this and there is nothing in the second line of authority that militates against it." *Moore's Federal Practice, Volume 5: 1996-97 Supplement, "Jury Trial of Right," p. 38-369.*

What is "the second line of authority" that is "preferable" that Professor Moore refers to?

> "The second and divergent line of authority holds that a demand for jury of the issues raised by the complaint, answer, and reply to defendant's *compulsory* counterclaim set out in its answer is timely if made not later than 10 days after the service of the reply. In *Garman v. Metropolitan Life Ins. Co.* the court stated:
>
> > Defendant argues that the demand should have been made within 10 days of the filing of defendant's answer to the complaint that being the last pleading in the law action. This proposition assumes that the counterclaim is distinct from the answer and that only the complaint and answer presented a matter for the jury. This argument is in conflict with the Ettelson case and our holding herein, because under the authority of that case the counterclaim also presents an issue triable by jury in the federal court. The demand having been filed within 10 days from the service of the reply, the last pleading directed to the issue also to be tried by jury, it was within time as provided in Rule 38(b)."

Garman v. Metropolitan Life Ins. Co., 7 FRD (D NJ 1947) 473, 476-477 S.C. 175 F.2d (3rd Cir. 1949) 24, citing *Ettelson v. Metropolitan Life Ins. Co.*, 137 F.2d (3rd Cir. 1943) 62, *cert. denied*, (1943) 320 U.S. 777, 64 S. Ct. 92, 88 L. Ed. 467.

Silver's counterclaim, with the jury demand clearly typed in two places, on the top of the first page and on the final page, appears in Appendix 7 below at App. 59

and App. 73. Silver's jury demand is general and factually related to respondent's claims, thus it was applicable to all issues triable of right to a jury.

There are other precedents for general jury demands attached to counterclaims being applicable to all issues. The Ninth Circuit in *Bentler v. Bank of America,* 959 F.2d (9th Cir. 1992) 138, 141, would agree that Silver's jury demand was timely, general, never waived, never moved to strike by respondent and reached out to the amended complaint filed 15 months later. The Ninth Circuit said: "Moreover, we have found a number of appellate decisions holding that where a defendant files with its answer a counterclaim that involves the same factual issues as the plaintiff's complaint, a plaintiff's jury demand served within 10 days of its reply is timely as to both counterclaim and the original claim. *See United States v. Anderson,* 584 F.2d 369, 372 (10th Cir. 1978); *Tights, Inc. v. Stanley,* 441 F.2d 336, 334 & n. 21 (4th Cir.), *cert. denied,* (1971); *Monolith Portland Midwest Co. v. Reconstruction Finance Corp.,* 240 F.2d 444, 448 (9th Cir.), *cert. denied,* (1957); *see also Wright & Miller,* 2320 at 93." Silver's counterclaim met this test.

The Ninth Circuit continued: "We see no reason to depart from this remarkably consistent line of authority and, therefore, hold that when defendants are jointly liable on a cause of action that contains 'any issue triable of right to a jury', a jury demand as to that issue is timely if served within 10 days after service of the last defendant's answer. Fed. R. Civ. P. 38(b). Because Bentler's jury demand was served *before* BAC served its answer, it was timely under Rule 38(b)." (*supra* p. 141.) The Ninth, Third, Fourth and Tenth Circuits and Professor Moore

would have upheld Silver's jury demand because his jury demand was attached to his counterclaim filed within 10 days of his answer to Count IV of the first amended complaint and prior to respondent's second amended complaint.

Thus the Seventh Circuit and the Ninth Circuit hold opposing views on jury demands attached to counterclaims.

II. THE HOLDING OF THE COURT OF APPEALS IN THIS CASE CONFLICTS DIRECTLY WITH THE HOLDING OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT IN *UNITED STATES V. ANDERSON*

Silver's counterclaim was dismissed by the District Court in 1991, and the question arises, did that factor negate Silver's general jury demand, as the lower courts stated. It did not according to the Tenth Circuit's ruling in *United States v. Anderson,* 548 F.2d (10th Cir. 1978) 369, 371. Concerning Anderson's counterclaim, the Government's motion to dismiss the counterclaim was filed on September 19, 1975. While it was pending, on November 11, 1975, beyond the 10-day period, Anderson's demand for jury trial was filed and it read in pertinent part as follows: "Comes now Defendant and pursuant to the United States Constitution DEMANDS A TRIAL BY JURY in the above titled section. On November 13 the court entered an order dismissing the counterclaim, and then on November 14, the trial judge entered his order denying the demand for jury trial." (*supra* p. 372.)

In reversing the District Court, the Tenth Circuit said that: "At the time the demand for trial by jury was filed

by Mr. Anderson his counterclaim was still pending. . . . That issue thus remained in the pleading stage and there had not been a 'last pleading' directed to such issue so as to cause the 10-day time limit of Rule 38(b) to run against making a demand for jury trial. . . . *Tights, Inc. v. Stanley,* 441 F.2d 336, 344 n.21 (4th Cir.); *Monolith Portland Midwest Co. v. RFC,* 240 F.2d 444, 448 (9th Cir.); *Miller v. Poretsky,* 409 F. Supp. 837, 840 n.4 (D.D.C.); and *Binger v. Unger,* 7 F.R.D. 121, 122 (S.D.N.Y.)"

Silver's counterclaim was still pending when his jury demand was filed, and there had not been a last pleading directed to the issues therein. Both Anderson's and Silver's counterclaims were dismissed. Although the Tenth Circuit upheld Anderson's Constitutional right to a jury trial, the Seventh Circuit denied the same to Silver. Thus, the Seventh Circuit and the Tenth Circuit hold opposing views on jury demands attached to subsequently dismissed counterclaims.

III. THE HOLDING OF THE COURT OF APPEALS IN THIS CASE CONFLICTS DIRECTLY WITH THE HOLDING OF THE SAME COURT OF APPEALS – THE SEVENTH CIRCUIT – IN A PRIOR CASE, *DASHO V. SUSQUEHANNA.*

The Court of Appeals in denying Silver's appeal said that petitioner's jury demand was untimely, because the final pleading was December 1, 1986, and the jury demand had to have been filed by December 11, 1986. But the Docket indicates otherwise. Judge Getzendanner granted an extension to Silver's new counsel until May 21, 1987 to respond to Count IV of the first amended

complaint; and Silver's jury demand was attached to his counterclaim filed 10 days later (deducting one legal holiday) on June 1, 1987.

Another possible final pleading was August 25, 1988 when Lincoln filed its second amended complaint, which was the complaint that the District Court ruled on. Silver's newly-appointed counsel saw that the case was docketed for trial by jury, and there was no requirement to make another demand according to the Second Circuit in *Rosen v. Dick,* 639 F.2d 82 (2nd Cir. 1980), 82 and the Fifth Circuit in *Daniel Intern. Corp. v. Fischbach & Moore, Inc.* 916 F.2d (5th Cir. 1990), 1061, 1065.

In *Dasho v. Susquehanna Corp.,* 461 F.2d (7th Cir. 1972) 11, 22 cited in *Moore's Federal Practice* (*Ibid.* 39.32), the Seventh Circuit granted a jury demand made "more than 38 months after original complaint and several months after all defendants had answered. It was incorporated in a reply which itself was not filed within the time specified by the court." (*supra* p. 21.) But, the Seventh Circuit continued, "By permitting the reply to be filed on December 30, 1968, the trial court effectively extended the time for filing the 'last pleading', and thus the time in which to demand a jury." (*supra* p. 22.) Judge Getzendanner in the instant case granted Silver an extension until May 21, 1987 to respond to Count IV, of respondent's amended complaint.

Several District Court cases in the Seventh Circuit have relied on *Dasho.* In *Outdoor Sports v. Televest,* 88 F.R.D. (ND Ill. 1980) 44, the District Court upheld an untimely jury demand as timely where "defendant filed a counterclaim for abuse of process, but did not demand a jury trial. Ten months later plaintiff moved for summary

judgment that the counterclaim was barred by the court's prior denial of defendant's motion for Rule 11 sanctions, but plaintiff did not reply to the counterclaim. Nine months later with leave of court defendant filed a supplemental counterclaim for malicious prosecution and demanded a jury. As the summary judgment motion did not address the merits of the counterclaim, it was not a responsive pleading within the meaning of Rule 38(b) that would put the counterclaim at issue. The jury demand was held timely and plaintiff's motion to strike was denied." *Moore's Federal Practice*, 38-39 (2).

In another District Court case that relied on *Dasho*, a case where the jury demand was filed with a delayed reply, the District Court judge said: "[Rule 38(b)] only requires a demand within ten days of the service of the last pleading. The Rule does not require that pleading to have been timely." *Veizaga v. The National Board*, 27 FR Serv2d (ND Ill. 1979) 426, 427.

In the instant case, the Seventh Circuit makes a procedural argument about the separation of Count IV from the body of Lincoln's first amended complaint in arguing that Silver's jury demand was untimely. But, in a previous Seventh Circuit case, *Dasho*, the Seventh Circuit granted an extension of time to make the last pleading, as did Judge Getzendanner in the instant case, and that extended the time to toll the 10 days.

IV. THE HOLDING OF THE COURT OF APPEALS IN THIS CASE CONFLICTS DIRECTLY WITH THE HOLDING OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *DANIEL V. FISCHBACH.*

Five years after this case was docketed for jury trial Lincoln submitted a memorandum of law in opposition to Silver's claim for jury trial (See Appendix 8, entry 433 at App. 77.) Silver had not made any motion for jury trial, as the Seventh Circuit stated (Appendix 1, at App. 9) since a timely demand was made on June 1, 1987 and the case had been docketed for jury trial at all times since that date on the court's own Docket sheets for this case. (See Appendix 8.) Therefore, the proper procedure would have been for Lincoln to file its own motion to strike the jury demand which had been docketed for more than five years. Thus, Silver filed a Memorandum in Support of a Jury Trial on November 16, 1992. (See Appendix 6.)

The District Court, in denying Silver's jury demand, stated that his jury demand was untimely because "under Rule 38 amendments or supplemental pleadings do not extend the time for making a demand for jury trial except as to new issues raised by the new pleadings." (See Appendix 4 at App. 29.) However, Silver's jury demand was attached to a compulsory counterclaim which raised new issues while stating, "This counterclaim arises out of the same transactions and occurrences alleged in Count IV and the other Counts of Lincoln's second amended complaint herein against Silver, ADSP, SFPEF II and the First National Bank of Boston and is therefore compulsory under Fed. R. Civ. P. 13(a)." (See Appendix 7 attached hereto at App. 60.) The Seventh Circuit upheld the District Court's order.

The Fifth Circuit would disagree. In *Daniel Intern. Corp. v. Fischbach & Moore, Inc.*, 916 F.2d (5th Cir. 1990) 1061, 1065, 1066, the court denied Daniel's motion to strike a jury demand as untimely although F&M had delayed over four months in filing its jury demand, because there was no opposition to the jury demand when it was filed. The Fifth Circuit said: "F&M was entitled to conclude that the district court recognized and approved its jury demand." (*supra* p. 1065.) The Fifth Circuit continues: "Technical insistence upon imposing a penalty for default [under Rule 38] by denying a jury trial is not in the spirit of the rules. 9 C. *Wright & Miller, Federal Practice and Procedure* § 234 at 115-16 (1971)." (*supra* p. 1066.)

Thus, even if Silver's July 1, 1987 jury demand was untimely, there was no objection to it for more than five years and the case was docketed at all times, so that Silver was entitled to conclude that the District Court had recognized and approved his jury demand. Rule 39(b) grants the district court discretion to relieve a party from waiver of a jury trial under Rule 38. "However, the Seventh Amendment confers a fundamental right. This modifies the usual approach to review of abuse of discretion." *Daniel* at 1064. The Seventh Circuit holds an opposing view on abuse of discretion to that of the Fifth Circuit.

V. THE HOLDING OF THE COURT OF APPEALS IN THIS CASE CONFLICTS DIRECTLY WITH THE HOLDING OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN *ROSEN v. DICK*.

Petitioner's jury demand was filed and docketed on June, 1987 and respondent's second amended complaint

was filed and docketed in August, 1988. It embraced the issues previously alleged, and introduced the theory of RICO. Was Silver's jury demand timely as to the second amended complaint? No, says the Seventh Circuit. Yes, says the Second Circuit. In *Rosen v. Dick*, 639 F.2d at 91, the Second Circuit said that since a demand cannot be withdrawn without consent or court order, a party may rely on another's jury demand and duplicate jury demands need not be made. Reliance on the demand of another is limited, however, to the "issues embraced by that demand." *Id.* at 93, *quoting Collins v. Government of Virgin Islands*, 366 F.2d (3rd Cir. 1966), 279, 284, *cert. denied*, (1967), 386 U.S. 958, 87 S. Ct. 1026, 18 L. Ed. 2d 105.

In a 1989 Southern District of New York case, that relied on *Rosen* the District Court stated:

> "The question presented, then, is whether or not YJR's and Raveh's demand embraced the issues in Twin's case against Century. In its amended counterclaims alleging that Century aided and abetted YJR in submitting inflated bills to Twin, Twin asserted the same basic legal theories of fraud, RICO, breach of fiduciary duty, and unjust enrichment against Century as it did against YJR and Raveh. *Rosen*, 639 F.2d at 96, quoting *Lanza v. Drexel* (2d Cir. 1973), 479 F.2d 1277, 1310. In addition, Twin's claims against Century arose out of the same alleged factual circumstances as claims asserted against YJR and Raveh. Based on the similar character of the suits, id., we therefore conclude that YJR's and Raveh's jury demand encompassed the issues in Twin's action against Century and that Twin

> was entitled to rely on that demand." *YJ Enterprises, Inc. v. Twin County Grocers, Inc.*, 709 F. Supp. (S.D.N.Y. 1989), 499, 501.

The Second Circuit would disagree with the Seventh Circuit in the instant case, and say that Silver's jury demand of June 1, 1987 reached forward to Lincoln's second amended complaint of August 25, 1988, because of the "same alleged factual circumstances" contained in all of the complaints and in Silver's counterclaim.

VI. STATUTORY DAMAGE CASES SHOULD BE DECIDED BY A JURY ACCORDING TO THE UNITED STATES SUPREME COURT IN *CURTIS v. LOETHER, F.W. WOOLWORTH V. CONTEMPORARY ARTS, TULL V. UNITED STATES* AND THEIR ANTECENDENTS.

Some of the most important rulings by the Supreme Court concerning the Seventh Amendment to the Constitution have arisen when lower courts disagreed on the right of a litigant to a jury trial on statutory and equitable issues. RICO is a cause of action based on congressional enactment, and it must be tried in front of a jury, according to the view of this Court in *Tull v. U.S.*, 107 S.Ct. 1831 (1987). Respondent amended its claim to include RICO in August, 1988 approximately 15 months after Silver's jury demand.

In *Curtis v. Loether,* this Court upheld the Seventh Circuit in stating that the Seventh Amendment applies "to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Curtis v. Loether,* 415 U.S. 189, 194 (1974). The instant case meets that test.

A District Court in Missouri within the last year relied on *Curtis v. Loether* in granting trial by jury in a late filing case:

> "The Supreme Court has consistently recognized a strong federal policy favoring trial by jury and has extended the right to a jury trial beyond its historic boundaries. *Shere v. Foodmaker, Inc.* 921 F. Supp. 652 U.S.D.C. ED MO (1996) citing *Simler v. Conner* 372 US 221, 222, 83 S.Ct. 609, 610-11 (1963). "The federal policy favoring jury trial is of historic and continuing strength." *Id.* at 194.

More than 20 cases in the 19th and 20th centuries ruled on by the Supreme Court would question the opinion of the Seventh Circuit in this case that denied Silver his Constitutional right to trial by jury. The most significant of these are summarized as follows: *Hepner v. United States,* 213 (U.S. 1909) 103, 115 deemed trial by jury is a constitutional entitlement where the defendant contradicts the evidence. ("The defendant was, of course, entitled to have a jury summoned in this case . . . "). *Dimick v. Schiedt,* 293 (U.S. 1935) 474, 486 ("Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.") *F.W. Woolworth Co. v. Contemporary Arts, Inc.,* 344 (U.S. 1952) 232 ("Because statutory damages have evolved . . . arguably preeminently to punish the defendant, we think it especially appropriate to leave the decision to the jury's discretion and sense of justice.") (citing *L.A. Westerman Co. v. Dispatch Printing Co.,* 249 (U.S. 1919) 100, 196.) *Byrd v. Blue Ridge Rural Electric Coop., Inc.,* 356 (U.S. 1958) 525, 537-538

("The federal system distributes trial functions between judge and jury and under the influence – if not the command – of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.") *Tull v. United States*, 481 U.S. 412 at 426 (1987) ("But if the award of statutory damages by a jury is "necessary to preserve the 'substance of the common-law right of trial by jury; then a jury trial is constitutionally required",) as cited in *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d (8th Cir. 1996), 635, 644. *Beacon Theatres v. Westover*, 359 (U.S. 1959) 500, 510-511 (" . . . that only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.") In the *Beacon Theatres* case, the jury demand was attached to the counterclaim as was Silver's. *Dairy Queen v. Wood*, 369 (U.S. 1959) 894, 900 (" . . . in an action to collect a debt for breach of contract between the parties, petitioner has a right to have a jury determine not only whether the contract has been breached and the extent of the damages if any, but also just what the contract is.") Justice Harlan said in *Hodges v. Eaton* in 1882: "It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States. They might have waived that right, but it could not be taken away by the court." *Hodges v. Eaton*, 106 U.S. 408, 412. Hodges is relied on in *Aetna v. Kennedy* where the Supreme Court said, "But, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. (1937) 393, citing *Slocum v. New York Life*

Ins. Co., 228 U.S. 364, 385. *Patton v. United States*, 281 U.S. 276, 312 (1929). *Dimick v. Schiedt*, 293 U.S. 474, 486. *Foust v. Munson S.S. Line*, 299 U.S. 77, 84 (1936).

The decision of the Seventh Circuit has the effect of placing procedure above the Constitution, and reverses rather than follows the trend of this Court toward favoring trial by jury.

In denying Silver's appeal based on failure to notify him of the trial date, the Seventh Circuit said " . . . the docket shows that the Clerk of the Court mailed notices . . . " (See Appendix 1 at App. 5), but in denying Silver's appeal based on the jury demand issue, the Seventh Circuit does not point to the Docket at all. But, if Silver's jury demand was on the Docket for more than six years, in the Fifth or the Second Circuits, his jury demand very likely would have been granted.

CONCLUSION

The Seventh Circuit's denial of Silver's jury demand because it came in on his counterclaim conflicts directly with the Third, Fourth, Ninth and Tenth Circuits and Professor Moore.

A jury demand attached to a subsequently dismissed counterclaim, remains a valid jury demand according to the Tenth Circuit, which relied in *United States v. Anderson* on rulings in the Fourth and Ninth Circuits.

When a court extends the time for a reply to a pleading, a jury demand filed within 10 days of that reply is a timely jury demand, according to *Dasho v. Susquehannah*,

an earlier ruling in the Seventh Circuit, which other courts have relied on.

The Seventh Circuit's argument that Silver should have made a jury demand following Lincoln's second amended complaint, or within 10 days of Silver's reply to it, conflicts with rulings in the Second and Fifth Circuits which cite the Docket and the lack of necessity for a duplicate jury demand.

Finally, Lincoln's second amended complaint sought an award of statutory damages under RICO, which the Surpeme Court has ruled requires a jury trial upon demand. The Seventh Circuit's ruling did not take the Supreme Court's orders in *Curtis v. Loether, F.W. Woolworth v. Contemporary Arts* or *Tull v. United States* into consideration.

Petitioner's jury demand was general and timely as to the reply to Count IV to the counterclaim and to the second amended complaint according to a majority of the circuit courts.

Petitioner's jury demand was on the Docket for more than six years without a motion to strike, which would have been sufficient to preserve his Seventh Amendment right in the Second and Fifth Circuits.

Peculiarly, the Seventh Circuit reversed its opinion in *Dasho* where it ruled that if the court grants an extension of time to file a pleading, a general jury demand filed within 10 days thereof is timely as to all issues triable of right to a jury.

In the instant case, the Seventh Circuit denied Silver's right to a jury trial even though his jury demand

was made within 10 days of a reply, for which the court extended the time for filing, it was on the Docket far more than six years, there was never a motion to strike it, there was never a waiver and respondent admitted to no prejudice if a jury tried the case, one month before trial. Morever, an amended complaint came in after the jury demand that brought in RICO, with its statutory triple damage awards, for which a jury trial is Constitutionally required, if demanded, according to the Supreme Court in *Curtis v. Loether, F.W. Woolworth v. Contemporary Arts* and *Tull v. United States.*

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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pro se

APPENDIX 1

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Argued April 25, 1997

Decided May 15, 1997

Before

Hon. Richard A. Posner, Chief Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge

LINCOLN NATIONAL LIFE INSURANCE COMPANY, an Indiana corporation in its individual capacity and as assignee of the Santa Fe Private Equity Fund II, L.P., a New Mexico limited partnership, *Plaintiff-Appellee,* No. 96-3068 *vs.* A. DAVID SILVER and Ads Partners, L.P., a New Mexico limited partnership, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 86 C 7175 **John A. Nordberg,** ***Judge.***

ORDER

In August 1988, the Lincoln National Insurance Company ("Lincoln") filed a second amended complaint against seven defendants. Lincoln, an Indiana corporation with its principal place of business located in Fort

Wayne, Indiana, brought its suit in both its individual capacity and as assignee of Santa Fe Private Equity Fund, L.P. II (SFPEF II), which was a New Mexico limited partnership organized to invest in existing and newly formed health care ventures.[1]

The defendants were:

1. ADS Partners, L.P. (ADSP), also a New Mexico limited partnership which was the general partner of SFPEF II until February 1987. In February 1988, it filed a bankruptcy petition in the United States Bankruptcy Court for the District of New Mexico;

2. A. David Silver, the managing general partner of ADSP and a related entity, ADS Associates (ADSA). He resides in Santa Fe, New Mexico. In February 1987, ADSP was removed as general partner of SFPEF II by the limited partners and John Clark was appointed receiver for SFPEF II;

3. Arthur Young & Co., which was a Certified Public Accounting partnership with its principal office in New York City. It acted as auditor for Santa Fe Private Equity Fund I, Avantgarde Publishing Corporation/Family Achievement Software Corporation, SFPEF II, ADSP

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[1] SFPEF II was named as a defendant in Lincoln's original complaint and amended complaint. After SFPEF II was placed in receivership, its receiver assigned to Lincoln all of SFPEF II's claims against Silver and other defendants. Lincoln subsequently amended its amended complaint, dropping SFPEF II as a defendant and asserting claims both individually and as assignee of SFPEF II.

and ADSA. It allegedly advised Silver and ADSP in organizing SFPEF II and assisted Silver and ADSP in promoting SFPEF II to potential investors;

4. Philip J. DeWald of Albuquerque, New Mexico, who was in charge of auditing SFPEF II's account;

5. Al Boos, a resident of Phoenix, Arizona, who was managing partner of Arthur Young's Albuquerque office and principal on the SFPEF II and ADSP accounts;

6. Reta Jones of Albuquerque, New Mexico, who was a senior manager at Arthur Young and responsible for supervising the audit of SFPEF II; and

7. Kirk Meyer of Albuquerque, New Mexico, who was also employed by Arthur Young and assigned to the audit of SFPEF II and assisted in preparing its annual report.

Eventually all defendants named in the second amended complaint were dismissed except Silver and ADS Partners, Ltd., the managing general partner of SFPEF II.

Lincoln's second amended complaint was in 23 counts, only twelve of which were tried to the district court. They may be summarized as follows:

In Count I Lincoln, individually, claimed that defendants violated Section 12(2) of the Securities Act of 1933.

In Count III Lincoln, individually, claimed that defendants violated Section 10(b) of the Securities Exchange Act of 1934.

In Count IV Lincoln, individually, claimed that defendants violated Section 5/12 of the Illinois Securities Law of 1953.

In Counts VI and VII Lincoln, individually and as SFPEF II's assignee, claimed that defendants breached fiduciary duties owed under New Mexico Stats. Ann. §§ 54-2-9 and 54-1-21(A) (1978).

In Counts VIII, IX and X Lincoln, individually, claimed that Silver violated Sections 1962(a), 1962(b) and 1962(c) of the Racketeering Influenced and Corrupt Organizations Act (RICO). 18 U.S.C. §§ 1961 *et seq.*

In Counts XI, XII and XIII Lincoln repeated its claims as assignee of SFPEF II, claiming that Silver violated 18 U.S.C. §§ 1962(a), 1962(b) and 1962(c).

In Count XXI, Lincoln, individually, claimed that Silver engaged in common law fraud.

On September 29, 1995, Judge Nordberg handed down an 80-page Memorandum Opinion and Order. The court found for plaintiff and against the defendants on all twelve counts and awarded plaintiff $22,903,788 in damages (representing actual damages of $7,134,556 trebled plus $1,500,000 in punitive damages). The court also held that Lincoln was entitled to reasonable costs and attorney's fees. Final judgment was entered against Silver, including plaintiff's attorney's fees and costs, in the amount of $24,173,864.98 (App. 3).

For the reasons given in the attached Memorandum Opinion and Order of the district court, the judgment is affirmed on the merits. However, Silver's briefs raise six points that will be discussed here.

1. *Rescheduling of trial date.* Silver contends that the district court should have rescheduled the trial date. However, Judge Nordberg scheduled the trial six months in advance. By then the case had been more than six years old, discovery was closed and the parties had engaged in trial preparations. Moreover, Silver acknowledges that the docket shows that the Clerk of Court mailed notices of the trial date to him on January 26, 1993, thus satisfying Rule 77(c) of the Rules of Civil Procedure. In any event, he concedes that he knew of the trial date more than a month in advance, during which he could have scheduled witnesses. Also, Judge Nordberg continued the close of the trial for a month to accommodate Silver. Silver also complains that further rescheduling was needed to accommodate his plan to use Philip J. DeWald as a witness. DeWald lived and worked in New Mexico and was beyond the subpoena power of the court under Federal Rule of Civil Procedure 45(a)(2) and (b)(2) and Silver eventually informed the court that he would not attempt to call him as a witness. However, during the second week of the trial Silver requested a continuance until the end of September because of a business crisis of DeWald. Accordingly the court accommodated plaintiff by scheduling an additional trial date for September 30, 1993. On that date Silver told the district judge that DeWald could not make it on that date and instead submitted portions of DeWald's deposition and told the court that he was resting his case in chief without calling any further witness. Consequently there was no prejudice to Silver in the denial of a continuance.

2. *Defendant contends that he should have been granted a jury trial.* As explained below, Silver's jury demand in

the proceedings below was untimely and properly denied.

A brief chronology of events is helpful to understanding the jury-demand issue. Lincoln filed this action on September 23, 1986. An amended complaint was filed six days later on September 29, 1986. On December 1, 1986, Silver and ADSP filed an answer to all counts of the amended complaint except Count IV (alleging violation of Illinois securities law), which Silver sought to dismiss on statute of limitations grounds. Defendants' answer did not contain a jury demand. On May 21, 1987, after the district court denied defendants' motion to dismiss Count IV, Silver filed his answer to that count. The answer contained no jury demand. On June 1, 1987, Silver filed a counterclaim, containing a jury demand, against Lincoln, alleging breach of contract, inducement of breach of contract, business libel, and disparagement. On August 23, 1988, Lincoln filed a second amended complaint. Silver answered the complaint on October 24, 1988, and the answer did not contain a jury demand. As noted above, the case ultimately proceeded to trial on 12 counts of the 23-count second amended complaint. Approximately 10 months before trial – six years after the case was filed and after the close of discovery – Silver submitted papers to the district court requesting a jury trial. The court treated Silver's submissions as a motion for jury trial, and denied the motion.

Silver's argument on appeal that he was improperly denied a jury is predicated on the jury demand contained in his counterclaim filed on June 1, 1987. That jury demand, however, must be deemed effective only as to the issues raised in his counterclaim, not the issues raised

in plaintiff's complaint and joined 6 months earlier by Silver's answer thereto. Count IV of plaintiff's amended complaint alleged a cause of action under the Illinois Securities Act of 1953. 815 ILCS 5/2.1 *et seq.* Other than invoking the Illinois Securities Act as the basis for the count, the allegations of Count IV raised no new issues that were not already alleged in the remainder of plaintiff's complaint and fully answered. In particular, the core allegations of Count IV – namely, that Silver met with plaintiff's representative in June 1985 for the purpose of inducing Lincoln's participation in the SFPEF II partnership; that Silver made false representations concerning the nature of the investments in which SFPEF II would invest; and that as a direct and proximate result of Silver's misrepresentations plaintiff invested in SFPEF II and sustained damages in excess of $900,000 – are all contained in Count III of the amended complaint, which alleged a securities fraud claim under Section 10(b) of the Securities Exchange Act of 1934, and which was answered by Silver on December 1, 1986.

As this Court has observed on many occasions, the Rules of Civil Procedure do not require plaintiffs to separately denominate counts in their complaints, with each such count corresponding to a particular statute or legal theory. See, *e.g., Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1077 (7th Cir. 1992). Here the fact that Silver did not specifically answer the particular allegations contained in a separately denominated count (Count IV) until six months after he had answered materially identical allegations was entirely an incidental consequence of the manner in which Lincoln structured its complaint. Thus if Lincoln had simply set forth all of its factual

allegations and concluded with an appropriate prayer for relief, Silver would have answered all such allegations and this artificial splitting of the answer would never have occurred. (Furthermore, although courts, including our own, commonly entertain statute of limitations defenses that have been submitted under the guise of a "motion to dismiss," such defenses are technically affirmative defenses under Fed.R.Civ.P. 8(c); and, the pleading of an affirmative defense does not relieve a defendant from the obligation of answering the allegations of the complaint. Thus, had Silver pursued his affirmative defense in accordance with the Rules, he would have answered the allegations of Count IV.) On the unique facts presented by this case, we conclude that all issues raised in Lincoln's complaint were joined by Silver's December 1, 1986, answer. Therefore, the jury demand contained in his counterclaim, filed six months later, was untimely as to those issues and was properly denied.

Silver relies heavily on the proposition that a general jury demand must be construed as a jury demand as to all issues triable by a jury. As a general matter, he is quite correct in this statement of the law. Indeed, Rule 38(c) expressly provides that "In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable." Had Silver's June 1, 1987, jury demand been timely, the Rule would plainly have had some effect; however, there is no authority for the proposition that an untimely jury demand constitutes a valid jury demand for all issues so triable *including those for which the right to a jury trial has been waived by virtue of the defendant's failure to timely demand such a trial.* We have

carefully reviewed all of the decisions cited by Silver in this regard and find no support in any of them for Silver's expansive application of the general rule.

In addition to the jury demand contained in his counterclaim, Silver also moved the district court for a jury trial in late 1992, six years after the case had been filed. In denying Silver's belated motion, Judge Nordberg remarked that a bench trial was an advantage to defendant – who, at this late date was proceeding pro se in the district court[2] – because he would then "be able to get all the evidence in that is relevant and should get in." (Def.'s App. 1, p. 14). Judge Nordberg also noted that a bench trial would be advantageous for Silver because "if, in good faith, a particular witness for the defendant is not able to be present during the time period that we have set, because it is a bench trial, we will be able to continue the hearing for a short period of time to permit the defendant to complete the presentation of his case." *Id.* It is plain that Judge Nordberg did not abuse his discretion in denying Silver's untimely request and that Silver suffered no prejudice from that denial.

3. *Statute of limitations defense.* Silver faults the district court for not discussing whether Lincoln's Rule 10b-5 and RICO claims are barred by the statute of limitations. However, at trial Silver introduced no evidence in support of the statute of limitations defense or explained

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[2] Silver had been represented by well-known and able counsel for four years, but they never made a jury demand in any answer to plaintiff's complaint or amended complaints, and never requested a jury trial under Rule 39(b) of the Federal Rules of Civil Procedure.

its basis. It was not mentioned in his opening statement, closing argument, motion for directed verdict, proposed findings of fact or motion for new trial. Consequently the argument was waived. *Libertyville Datsun Sales, Inc. v. Nissan Motor Corp.*, 776 F.2d 735, 737 (7th Cir. 1985); *In re Pan American World Airways, Inc.*, 905 F.2d 1457, 1462 (11th Cir. 1990). Lincoln invested in SFPEF II on August 1, 1985, and filed suit a little more than a year later on September 23, 1986. A Rule 10b-5 claim must be filed within one year from the date that the plaintiff knew or should have known of the fraud or no more than three years after the sale. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 362. The statute of limitations runs when the victim becomes aware of facts that would have led a reasonable person to investigate whether he might have a claim. *Tregenza v. Great Am. Communications Co.*, 12 F.3d 717, 722 (7th Cir. 1993), certiorari denied, 511 U.S. 1085. The testimony was that Lincoln first learned about Silver's fraudulent activities through a letter of February 15, 1986 (Tr. 137-143). Any statute of limitations defense was doomed to failure. Since no facts were introduced at trial to support a statute of limitations defense as to Lincoln's Rule 10b-5 claim, it is barred.

Silver's contention that Lincoln's RICO claims are barred by the statute of limitations was waived because it was not raised in his answer or before the district court. *Johnson v. Sutherland*, 922 F.2d 346, 355 (7th Cir. 1990). In any event Lincoln's RICO claims were not filed until its second amended complaint of August 23, 1988, well within the four-year statute of limitations. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156.

4. *Denial of Silver's motion in limine.* Silver contends that Judge Nordberg did not rule on his motion *in limine* to bar the deposition testimony of Messrs. Stoefen, Ray and Mills. However, the motion was orally denied, causing Silver to file a written objection. The court twice explained that the motion was denied, causing Silver to designate portions of the deposition transcripts of these witnesses. In addition, Silver's motion *in limine* came six months after the November 30, 1992, due date set by the magistrate judge. Therefore the motion *in limine* was untimely.

5. *Ernst & Young settlement agreement.* Silver claims that the district court should have ordered production at trial of the Ernst & Young settlement agreement with Lincoln and should have trebled the amount before offsetting the settlement from the judgment against Silver. However, Lincoln did file the settlement agreement under seal as directed by the court and it was reviewed by Silver.

If the district court trebled the settlement amount before deducting it from plaintiff's damages, Lincoln would not have fully recovered all its damages and Silver would have received a windfall. Instead the district court properly refused to treble the settlement amount before deducting it from Lincoln's damages. *Liquid Air Corp. v. Rogers,* 834 F.2d 1297, 1310 (7th Cir. 1987), certiorari denied, 492 U.S. 917. Moreover, the issue was waived because not raised below. *Libertyville Datsun Sales, Inc. v. Nissan Motor Corp.,* 776 F.2d 735, 737 (7th Cir. 1987).

6. *Miscellany.* Silver asserts that the district court failed to order Lincoln to produce all Berk's diary notes. However, Lincoln did produce all non-privileged pages of

those notes and plaintiff failed to request the privileged pages.

Silver also asserts that the district court abused its discretion in admitting the deposition testimony of William Enloe. This supposedly violated the court's following rule:

> We do prohibit witnesses that are to be substantive witnesses from appearing in court prior to their testimony.

However, the court found that the order had not been violated because Enloe was a rebuttal witness and did not sit through the trial, so that its sequestration order had not been violated. Even if there had been a violation, admission of Enloe's testimony would have been proper. *Burks v. Oklahoma Pub. Co.*, 81 F.3d 975, 980 (10th Cir. 1996), certiorari denied, 117 S.Ct. 302. In addition, Silver did not request exclusion of Enloe's testimony nor assert that he was prejudiced by Enloe's knowledge of Silver's testimony.

We have considered numerous other alleged legal and factual errors made by the trial court and deem them meritless. Consequently the judgment is affirmed.[3]

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[3] Plaintiff's motion to strike portions of defendant's brief and appendices is denied.

APPENDIX 2

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
June 9, 1997
Before
Hon. Richard A. Posner, Chief Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge

LINCOLN NATIONAL LIFE INSURANCE COMPANY, an Indiana corporation in its individual capacity and as assignee of the SANTA FE PRIVATE EQUITY FUND II, L.P., a New Mexico limited partnership,	) Appeal from) the United) States District) Court for the) Northern) District of) Illinois, Eastern) Division.
Plaintiff-Appellee,	)
No. 96-3068 *vs.*	) No. 86 C 7175
A. DAVID SILVER and ADS PARTNERS, L.P., a New Mexico limited partnership,	) **John A.**) **Nordberg,**) *Judge.*
Defendants-Appellants.	)

ORDER

On consideration of the "Petition for Rehearing En Banc" (construed as a petition for rehearing with suggestion for rehearing en banc) filed by defendant-appellant A. David Silver on May 29, 1997, all of the judges on the panel have voted to deny rehearing and no judge in active service has requested a vote on the suggestion for rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, an Indiana corporation, in its individual capacity and as assignee of the SANTA FE PRIVATE EQUITY FUND II, L.P., a New Mexico limited partnership,

Plaintiff - Appellee

v.

No. 96-3068

A. DAVID SILVER,

Defendant - Appellant.

NOTICE OF FILING

TO: MICHAEL J. KOENIGSKNECHT, Esq.
Peter J. Meyer, Esq.
GARDNER, CARTON & DOUGLAS
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PLEASE TAKE NOTICE THAT ON Wednesday, May 28, 1997, A. David Silver, *pro se* filed with the above court his Petition for Rehearing en banc, a copy of which is attached hereto and here – with [sic] served upon you.

By: /s/ A. David Silver
A. David Silver, *pro se*

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LIST OF EXHIBITS

1. Docket in Case No. 86-C7175 through the trial.
2. Silver's Memorandum in Support of a Jury Trial, filed November 16, 1992.

PETITION FOR REHEARING EN BANC IN CASE NO. 96 3068

TABLE OF CASES

Beacon Theatres, Inc. v. Westover, U.S. District Judge 359 (U.S. Ct. 1981) 500, 510

Bentler v. Bank of America, 959 F. 2d (9th Cir. 1992) 138, 141

Chapman v. Kleindienst, 507 F. 2d (7th Cir. 1974), 1253

Consolidated Fisheries Co. v. Fairbanks Morse and Co., 9 FRD (ED Pa. 1949) 539, 540

Dasho v. Susquehanna, 461 F. 2d (7th Cir. 1972) 11, 22, as cited in Moore's Federal Practice, 1996, 39.08

Horwitz v. Alloy Automotive Corp., 677 F. Supp. (ND ILL. 1988) 564, 566

Lovelace v. Dall, 820 F. 2d (7th Cir. 1987) 223, 228

Monolith Portland Midwest Co. v. Reconstruction Finance Corp., 240 F. 2d (9th Cir. 1957) 444, 448

Outdoor Sports v. Televest, 88 FRD (ND ILL. 1980), 44, as cited in Moore's Federal Practice, 1996, 39.08

Tights, Inc. v. Stanley, 441 F. 2d (4th Cir. 1971) 334, 336 & n. 21

United States v. Anderson, 548 (10th Cir. 1978) 369, 372

PETITION FOR REHEARING EN BANC IN CASE NO. 96 3068

TABLE OF AUTHORITIES

Moore's Federal Practice, 1996, paragraphs, 39-08, 39-32 and 38-39(2).

PETITION FOR REHEARING EN BANC IN CASE NO. 96 3068

I. INTRODUCTION

1. The Court of Appeals for the Seventh Circuit (the "Court") represented by Judges Posner, Cummings and Flaum, denied the appeal of defendant A. David Silver ("Silver") on all six points on 5/15/97 from the order of Judge John A. Nordberg in Case No. 86C 7175, Lincoln National Life Insurance Co. ("Lincoln") v. Silver, which case commenced on 9/23/86.

2. This petition will focus solely on one of the six points raised on appeal: the judicial error in denying Silver's jury demand of 6/1/87.

3. Judge Nordberg, in his denial on 1/15/93 of Silver's jury demand of 6/1/87 gave an opinion that the last pleading directed to any issue triable of right to a jury was Silver's response to all but one count (Count IV) of Lincoln's first amended complaint on 12/1/86. (See Fed. R. Civ. Pro. 38b.)

4. Silver contends that the last pleading was either his 5/21/87 response or Lincoln's second amended complaint (and the reply thereto) of 8/25/88 because it brought in a new issue – RICO – which raised new facts that finally framed the issues to be tried. The Court, in its opinion, discusses both dates, 12/1/86 and 8/25/88, as possible last pleading dates but the

Court does not give an opinion. So, three dates are in question.

5. The Court in its order said that jury demands contained in counterclaims (as was Silver's 6/1/87 jury demand) are effective only as to issues raised in the counterclaim, which position is in opposition to Moore and Wright and decisions in the 4th, 7th, 9th and 10th circuits.

6. Silver's jury demand was on the docket at all times after filing. (See Exhibit 1.)

7. Silver's jury demand met the requirements of Rules 39(a), 77© and 79(a) of the Fed. R. Civ. Pro. and Lincoln never moved to strike it nor did Judge Nordberg move to rescind it for cause shown.

8. Lincoln stated on two occasions one month before the trial that it had "held in abeyance a lot of our trial preparations until we know whether or not it's going to be a jury or a bench trial." (App. Brief, Exh1, p.6).

9. Lincoln misled the Court twice in one sentence in its brief about Silver's representation by counsel and his jury demand: "In the nearly four years that he was represented by counsel, Silver never moved for a jury trial" (Lincoln's brief, p.30). Both statements are untrue. The Court repeated Lincoln's untruthful statement as to the four years (order p.5, footnote 2), apparently without reading what Silver had said in denying Silver's appeal. The decision to treat Lincoln's untrue statement as true prejudiced Silver.

10. Silver's *pro se* time periods aggregated approximately 60 months of the 83 month pre-trial process, and his representations time periods [sic] aggregated 23 non-consecutive months, viz.:

	Time Periods
pro se	9/23/86-11/20/86
represented	11/21/86-4/21/87
pro se	4/21/87-5/8/87
represented	5/8/87-4/29/88
pro se	4/29/88-9/29/88
represented	9/29/88-6/27/89
pro se	6/27/89-3/12/90
represented	3/12/90-8/20/90
pro se	8/20/90-to present

11. Judge Nordberg took on the case from Judge Getzendanner on 9/25/87. Magistrate Weisberg took on the case from Magistrate Gottschall on 3/10/89.

12. Relevant pleading dates, events and *pro se* dates are as follows:

Relevant Dates	**Pleadings**	**Silver as pro se or Represented**
9/23/86	Lincoln's complaint	*pro se*
9/26/86	Lincoln's amended complaint	*pro se*
12/1/86	Silver's answer and Motion to dismiss Count IV	Represented
5/21/87	Silver's answer to Count IV	Represented
6/1/87	Silver's counter-claim with jury demand	Represented
8/25/88	Lincoln's second amended complaint (brings in RICO)	*pro se*
10/24/88	Silver's answer to Lincoln's second amended complaint	Represented

10/30/91	Silver's counter-claim denied	*pro se*
11/16/92	Silver's memorandum in Support of Jury Trial	*pro se*
7/15/93	Court's ruling for a bench trial; objected to by Silver	*pro se*
8/16/93	Trial begins	*pro se*

13. The Docket cites Silver's 6/1/87 demand for a jury trial on the front matter, again on p. 4, on p. 12 (entry 426) and p. 13 (entry 431). Silver's new counsel, admitted 9/29/88, could have demanded a jury trial with their answer to Lincoln's second amended complaint filed 10/24/88, but didn't because they saw on the docket that a jury demand had already been made.

14. The Court said that Silver's jury demand of 6/1/87, because it was contained in his counterclaim, " . . . must be deemed effective only as to the issues raised in his counterclaim . . . ". (order p.4). Moore and Wright disagree, because Silver's counterclaim was compulsory, not permissive. Moore and Wright discuss this on pp.38-369 to 38-369 of sec. 38-39(2), stating: "The defendant's *compulsory* counterclaim is a part of defendant's answer, factually related to plaintiff's claim, and realistically the issues are not formulated until the reply has been served. Furthermore, this line of authority adequately achieves the general objective of Rule 38 to have the method of trial settled well in advance of actual trial." *supra* p. 38-369)

15. But, if Silver inadvertently and procedurally waived his right to a jury trial, as the Court says he did beginning on p.4, para 4 of its Order, the panel of

judges that heard Silver's appeal was the same panel that said in *Lovelace v. Dall, 820 F2d. (7th Cir. 1987)* 225,:

"The rule that failure to object to proceeding with a bench trial (or other judicial fact finding) waives any existing jury demand rests on two sets of policies. One set is the standard rules that a party waives any objection not timely made and issues can not be raised on appeal if not first raised in the district court. *See National Family Insurance, 474 F. 2d at 241.* In Chapman, we determined that this reasoning does not apply to pro se litigants since they can not be presumed to have understood the applicable procedural requirements." *See also Chapman v. Kleindienst, 507 F.2d (7th Cir. 1974) 1253.*

Silver was *pro se* for 60 out of 83 months of the case, and he objected repeatedly to the denial of his constitutional right to trial by jury, and thus met the *Lovelace* and *Chapman* conditions. The Court in its Order denying Silver's jury demand as untimely as to Silver's 5/21/87 answer to Count IV, gives a procedural argument which Silver could not then or now be capable of understanding, according to this Court's opinion in *Lovelace* and *Chapman*.

II. ARGUMENT

16. When was the last pleading that brought in an issue triable of right by a jury? The Court order does not say. But isn't it Lincoln's second amended complaint, for without it Lincoln's RICO claim would not have been plead?

Rule 38(b) is clear that Silver's jury demand is timely as to Lincoln's second amended complaint. A jury demand does not have to be made *within* 10 days of the last pleading, but *not later than*. As Judge

Bua said in *Horwitz v. Alloy Automotive 677 F. Supp. (N.D. ILL. 1988) 564, 566*: "The 10-day period mentioned in Rule 38(b) sets the outside limit on when timely demand may be filed and does not require a party to wait until the last responsive pleading is filed before properly asserting a jury demand." In *Horwitz* the jury demand was made 9 months after the next to the last pleading but before the last pleading and reply.

In *Dasho v. Susquehanna Corp. 461 F.2d (7th Cir. 1972) 11, 22, cited by Moore and Wright (39-32)* Justice Stevens granted a jury demand (a case cited in Silver's reference to Moore and Wright in his reply brief) made "more than 38 months after original complaint and several months after all defendants had answered. It was incorporated in a reply which itself was not filed within the time specified by the court."

Similarly, in *United States v. Anderson, 584 F. 2d (10th Cir. 1978), 369* also cited by Moore and Wright (39-32), "Defendant filed counterclaim in tax collection suit, and government moved to dismiss. Although defendant filed jury demand more than ten days later, it was timely since no reply had been filed." Judge Nordberg erred in not applying Silver's 6/1/87 jury demand to the 8/23/88 last pleading. The Court repeated the error.

If Judge Nordberg did not err in citing 12/1/86 as the last pleading, he tried the case based on the issues plead in the second amended complaint, which brought up the new factual issues of RICO, and Silver's jury demand reached forward to that pleading.

17. What are the precedents for general jury demands attached to counterclaims being applicable to all issues? Judge Kozinski of the 9th Circuit in *Bentler v.*

Bank of America 959 F.2d (9th Cir. 1992) 138, 141, would agree that Silver's jury demand was timely, general, never waived, never moved to strike by Lincoln and reached out to the RICO amended complaint. Judge Kozinski said:" Moreover, we have found a number of appellate decisions holding that where a defendant files with its answer a counterclaim that involves the same factual issues as the plaintiff's complaint, a plaintiff's jury demand served within 10 days of its reply is timely as to both counterclaim and the original claim. *See United States v. Anderson, 584 F.2d 369, 372 (10th Cir. 1978); Tights, Inc. v. Stanley, 441 F.2d 336, 334 & n. 21 (4th Cir.), cert. denied, (1971); Monolith Portland Midwest Co. v. Reconstruction Finance Corp., 240 F.2d 444, 448 (9th Cir.) cert. denied, (1957); see also Wright & Miller, 2320 at 93.*

"We see no reason to depart from this remarkably consistent line of authority," continued Judge Kozinski. "Because Bentler's jury demand was served before BAC served its answer, it was timely under Rule 38(b)."

Putting Silver in Bentler's shoes and Lincoln in Bank America's, we can see that Judge Kozinski and his authorities would call Silver's jury demand timely, as to all issues in the case.

Jury demands seem to come in with counterclaims with frequency, and if they are general demands, they go to all issues. In *Horwitz v. Alloy Automotive, (1988)* the court said: "When a general jury demand is made without specifying particular issues, the jury demand will be interpreted as a demand for a jury trial on all issues in the case triable by a jury". Silver's jury demand was general. *Horwitz,* had waived jury demand on several issues but then made a timely jury demand on claims asserted in its

counterclaim. Judge Bua granted jury demand on all issues. His authority was a 1949 Pennsylvania case, *Consolidated Fisheries Co. v. Fairbanks Morse and Co., a FRD (ED Pa, 1949) 539, 540.* Lincoln said on p.28 of its brief in trying to attack the timeliness issue, that the "last pleading directed to any issue to be tried in Lincoln's Complaint was Silver's answer on December 1, 1986". But if you follow Lincoln's reasoning, then the trier of fact should not have ruled on Lincoln's RICO claims.

In *Dasho,* the jury demand was part of the counterclaim. In *Outdoor Sports v. Televest, 88 FRD (ND Ill. 1980) 44,* the District Court upheld an untimely jury demand filed with a counterclaim, and relied on *Dasho* as well. Here's another parallel of Silver and *Dasho*: Silver was also given an extension of time by Judge Getzendanner to May 21, 1987 to file the pleading which tolled the 10 days for his general jury demand. Thus, if the Court sees Judge Getzendanner's extension grant to 5/21/87 as the last pleading, then Silver's jury demand of 6/1/87 was timely as to his 5/21/87 answer to Count IV.

18. Reliance on the Docket: This case had as many as 10 defendants, two District Court judges plus two Magistrate Judges. But with all the comings and goings of judges and defendants one thing was constant: the docket unfailingly bore the words "Jury Demand" from June 1, 1987 onward. That seems like a pretty clear notice to everyone involved of the method of trial.

In denying Silver's appeal on point one, rescheduling the trial date, the Court relies on what is said in the docket; i.e., "Silver acknowledges that the docket shows that the clerk of the Court mailed notices of the trial date to him . . . ".

But in denying Silver's jury demand the Court fails to cite that the same Clerk of the Court docketed the case as a trial by jury. Silver's jury demand is a constitutional question, not a procedural one and as Justice Black said: "Since the right to a jury trial is a constitutional one, however, while no similar requirement protects trials by the Court, that discretion is very narrowly limited and must, wherever possible be exercised to preserve jury trial. *"Beacon Theatres, Inc. v. Westover 359 (USCt, 1958), 500, 510.* The Court erred in not applying the "in the docket" argument evenhandedly.

19. Lincoln Would Not Have Been Prejudiced: The actions of the Clerk of the Court cut both ways. If they can be used to deny Silver's first point then they can also be used to grant trial by jury. Rule 79(a) states: "When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that issue." Rule 39(a) states: "When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket to a jury action." Silver relied on that entry, as did Lincoln, whose counsel stated twice at the 1/15/93 pre-trial hearing that " . . . we have held in abeyance a lot of our trial preparations until we know whether or not it's going to be a jury or a bench trial", (App. Brief Exh 1, p.6) and " . . . Lincoln has not been able to do a lot of its pretrial preparation until now simply because we are still waiting to find out if it will be a jury or a bench trial," (App.'s Brief, Exh 1, p.10). Both Lincoln and Silver assumed that the Clerk's actions under Rule 39(a), with reference to Rule 38, and the Clerk's actions under Rule 77(c) had not been "rescinded by the court upon cause shown," and because under Rule 79(a) "trial by jury has been

properly demanded." Lincoln would not have been prejudiced by a jury trial.

20. Silver's November, 1992 Reassertion of Jury Demand: The Court does not consider the background of Silver's November, 1992 restated jury demand. (See Exhibit 2 below.) Acting *pro se*, Silver is told by Lincoln that the jury demand in the docket is a "docketing error", and Silver asked permission of M.J. Weisberg to seek clarification. M.J. Weisberg's minute order of 10/30/92 states: "Defendant's request . . . to submit a brief as to why this matter should be determined by a jury as it is currently docketed is granted."

This would have been the time for Lincoln to move to strike the action from the jury list. But it did not. "The party who desires to challenge the propriety of jury trial should move to strike the action of certain issues thereof from the jury list or calendar and transfer them to the court list or calendar." Moore's Federal Practice, 1996, para 39.02. Judges Posner, Cummings and Flaum examined the waiver issue in *Lovelace v. Dall, 820 F.2d (7th Cir. 1987), 233, 227.*

Lovelace a *pro se* litigant, consciously waived his right to a jury trial. These judges (the identical panel that Silver appealed to) said: "Had plaintiff insisted on a jury at the time of his trial, he would have been entitled to it since the original demand had never been properly withdrawn." *Ibid.*, 228 Judges Posner, Cummings and Flaum also said that the benefit of the doubt on a constitutional issue as important as trial by jury should be given to " . . . *pro se* litigants since they can not be presumed to have understood the applicable procedural requirements", citing *Chapman v. Kleindienst, 507 F. 2d (7th Cir. 1974),* 1253. Silver was a *pro se* litigant. Silver insisted on a jury 10 days after the delayed pleading granted by Judge

Getzendanner on 5/21/87, again 9 months before his trial (See Exhibit 2.) and again 30 days before his trial. Silver was not given the benefit of the doubt given to other *pro se* litigants by this Court.

At the time of the filing of the second amended complaint, Silver was *pro se*. (See Docket pp.8-9) Silver was unrepresented from 4/29/88 to 9/22/88. New counsel saw "trial by jury" stamped on the docket, and did not refile a jury demand with their answer on 10/25/88. Silver did not understand the applicable procedural requirements, and thus did not make a jury demand within 10 days of the filing of the second amended complaint (8/25/88) or inform new counsel that there may have been a docketing error. *Lovelace* and *Chapman* excuse him for not having understood the applicable procedures.

III SUMMARY

The Court erred in affirming Judge Ñordberg's denial of Silver's jury demand in the following areas by:

a. stating that Silver was represented by counsel for four years (Lincoln's untruthful statement), when it was 23 non-consecutive months out of an 83 month process;

b. assuming that Silver was represented by counsel at the time of the filing of the second amended complaint;

c. ignoring Judge Getzendanner's extension grant to file an answer to Count IV to 5/21/87, thus, making the 6/1/87 general jury demand timely as to that date;

d. stating that a jury demand contained in a counterclaim "must be deemed effective only as to the

issues raised in his counterclaim," when there are many precedents in the 7th Circuit as well as the 9th, 10th and 4th, plus Moore and Wright that disagree.

e. stating that Silver's 6/1/87 jury demand is not timely as to the last pleading of any issue triable of right to a jury, the second amended complaint of 8/25/88 and reply, when there are many precedents to the contrary including in the 7th Circuit; and

f. Reversing itself from the dictum of *Lovelace* and *Chapman* and holding Silver, a *pro se* litigant, to the same standards as represented litigants as to understanding "applicable procedural requirements".

For the reasons, cited, and because a constitutional issue is at stake, Silver petitions the Court for rehearing en banc.

Respectfully Submitted

/s/ A. David Silver
A. David Silver *pro se*

142 Lincoln Avenue
Santa Fe, NM 87501
505-983-1769

APPENDIX 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

(Reserved for use by the Court)

ORDER

On July 15, 1993, this Court denied Defendant David Silver's motion for a trial by jury. This order explains the reasons for that decision.

The Plaintiff in this case, The Lincoln National Life Insurance Company ("Lincoln"), filed its original complaint on September 25, 1986. Defendant Silver filed an answer to the complaint on December 1, 1986. The answer did not include a request for a jury trial. In June of 1987, Silver filed a counterclaim against Lincoln and made a request for a jury trial with the counterclaim. On October 30, 1991, this Court granted Plaintiff's Motion for Summary Judgment on Silver's Counterclaim.

Rule 38(b) of the Federal Rules of Civil Procedure says:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

Fed. R. Civ. P. 38(b). The last pleading directed to any issue to be tried before this Court was Silver's answer, filed in December of 1986. Since Silver failed to demand a

jury trial within ten days of his answer, he waived that right. Fed. R. Civ. P. 38(d).

Silver contends that he timely requested a jury trial in his counterclaim. However, "under Rule 38 amendments or supplemental pleadings do not extend the time for making a demand for jury trial except as to new issues raised by the new pleadings." *Communications Maintenance, Inc. v. Motorola, Inc.*, 761 F.2d 1202, 1208 (7th Cir. 1985). When a supplemental pleading with a jury demand raises new factual issues, it may be timely under Fed. R. Civ. P. 38. However, such a pleading is only timely with respect to the new counts or new issues raised. *Id.* Thus, where, as here, any new issues once raised in a supplemental pleading are no longer part of the law suit, a supplemental jury demand does not revive a waiver of a jury trial on the previously answered issues. A contrary rule would permit a party to change strategies on old issues well into the lawsuit. Such was not the purpose of Rule 38.

Silver did not request a jury trial in his answers to either the complaint or the second amended complaint. Although he is now representing himself, at the times he filed his answers to the Plaintiff's Complaint, he was represented by competent counsel.

Accordingly, as the Court previously held, Silver's Motion for a Jury Trial is DENIED.

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, an Indiana Corporation, in its individual capacity and as assignee of the SANTA FE PRIVATE EQUITY FUND II, L.P., a New Mexico limited partnership,	
Plaintiff,	No. 86 C 7175
v.	
A. DAVID SILVER and ADS PARTNERS, L.P., a New Mexico limited partnership,	Chicago, Illinois
	July 15, 1993
Defendants.	11:00 a.m.

TRANSCRIPT OF PROCEEDINGS – MOTION

BEFORE THE HONORABLE JOHN A. NORDBERG

APPEARANCES:

For the Plaintiff: MR. MICHAEL J. KOENIGSKNECHT
MR. PETER J. MEYER
GARDNER, CARTON & DOUGLAS
321 North Clark Street, Suite 3400
Chicago, Illinois 60610-4795

For the Defendants: A. DAVID SILVER (Pro se)
(Appearing by telephone)
524 Camino Del Monte Sol
Santa Fe, New Mexico 87501

PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PREPARED BY COMPUTER

MICHAEL P. SNYDER, CSR, RPR, CM
Official Reporter
United States District Court
219 South Dearborn Street, Room 2128
Chicago, Illinois 60604
Telephone (312) 435-5563

[p. 2] THE CLERK: 86 C 7175, Lincoln versus Silver.

MR. KOENIGSKNECHT: Good morning, Your Honor. Michael Koenigsknecht and Peter Meyer on behalf of Lincoln National.

THE COURT: All right. And you are here on –

MR. KOENIGSKNECHT: Also for Lincoln.

MR. MEYER: For Lincoln also.

THE COURT: And that's all we are anticipating now will be present at this end, is that right?

MR. KOENIGSKNECHT: Yes, sir.

THE COURT: Okay. Now, we'll be putting in a conference call to Mr. Silver then to review whatever matters he wishes to raise at this point, and we have this set down for trial for the 16th of August.

MR. KOENIGSKNECHT: Yes, sir.

THE COURT: For a bench, and I think we have – and I have blocked out two weeks for it, if it is going to take that long. And I want to go through the other two matters that we had previously set, because neither one is

going to be lengthy, and then we will get to your phone call, because that may take some time.

So let's call Pivot Point and American National.

(Recess.)

THE COURT: We had a motion that has been filed here, motion for rescheduling the trial. I don't know if you've received a copy of that. Let me just read that, and then we'll [p. 3] put in a call, and any responses you have you can make while we are on the record on the phone.

THE COURT: Terry, we need you to have the official file here to see what notice was given to Silver of the trial date.

THE CLERK: Okay.

THE COURT: He claims he never received a notice, so if you could pull the file.

MR. KOENIGSKNECHT: We have a copy of the minute order, Your Honor, that shows mail service by the clerk. It is photocopied.

MR. MEYER: And our copy as well.

THE COURT: And you received it?

MR. MEYER: Yes, Your Honor.

THE COURT: By mail?

MR. MEYER: Yes, Your Honor.

THE COURT: Okay. Well, maybe that's all we need.

MR. KOENIGSKNECHT: We have received some other things too, Your Honor. We can go into that at your pleasure. We received mailings from Mr. Silver.

THE COURT: Yes. The only problem is whether – oh, acknowledging that there is a trial?

MR. KOENIGSKNECHT: Well, talking about the fact that he's writing a book about the trial and which is going to be [p. 4] published in the fall, and he offered the senior partners in my firm the opportunity to make prepublication comments on his book.

THE COURT: All right. What I need, Terry, is to have you be able to put on the record the fact that Mr. Silver is listed pro se on the record of this case so that – being the sole defendant now remaining in the case, and that when notices go out, they automatically go out to him. That's what we need to get on the record. He's claiming he didn't receive a copy of the order that plaintiffs' counsel received, and –

THE CLERK: You want me to pull the docket and see that he is on the docket?

THE COURT: Well, I don't know how it appears.

THE CLERK: What they do is they –

THE COURT: How do we know who gets the mailings?

THE CLERK: You don't. They just put down the number, and they go from the list, the service list on the front of the docket sheet, if it is six attorneys –

THE COURT: I want a printout right now from this case showing that Silver's name is on the docket to receive mailing notices.

THE CLERK: Okay.

THE COURT: And when he was put on that docket. That's what we need.

THE CLERK: Okay.

[p. 5] THE COURT: It seems to me the computer can produce that for us.

THE CLERK: Yes.

THE COURT: Because otherwise there will be a question, even though they got the notice, whether the notice also went to Silver.

MR. KOENIGSKNECHT: He has been pro se for a couple of years now.

THE COURT: Yes, and as far as I know, he's getting all the notices.

MR. KOENIGSKNECHT: Well, he's appeared at hearings in front of Magistrate Weisberg on several occasions.

THE COURT: Right. All right. So let's as soon as you can bring that back up. Terry, we get on the phone then, and you can remain here. We'll bring you in as soon as we are ready.

MR. KOENIGSKNECHT: Judge, just for clarification, there is another motion pending, I don't know that it was noticed for today.

THE COURT: By Silver?

MR. KOENIGSKNECHT: No, no. At the pretrial conference in March, you indicated you would rule – I guess it is by Silver, Silver made a motion for a jury.

THE COURT: For a jury, right.

MR. KOENIGSKNECHT: You indicated in March you would [p. 6] rule on that in due course.

THE COURT: We have that to rule on.

MR. KOENIGSKNECHT: We made a motion recently to ask for ruling on that because we have held in abeyance a lot of our trial preparations until we know whether or not it's going to be a jury or bench trial.

THE COURT: Yes. I'll indicate on the record what we will plan to be doing on that. In fact, has he ever hinted that he is going to appear with an attorney in the case?

MR. KOENIGSKNECHT: No.

THE COURT: Do we know?

MR. KOENIGSKNECHT: He has not hinted one way or the other.

THE COURT: He's had a number of other, some other trials out there. Did he do, handle everything pro se?

MR. KOENIGSKNECHT: No, no. He has counsel in Santa Fe and Albuquerque that represented him and in Seattle that represented him on various trials and

hearings and so on in addition to his three or four Chicago firms, but he's no longer represented in this particular case, as far as I know.

THE COURT: Okay. And he's in [sic] not in bankruptcy as far as you know?

MR. KOENIGSKNECHT: Oh, he is in bankruptcy.

THE COURT: But you have had the stay lifted?

MR. KOENIGSKNECHT: We have had the stay lifted. It [p. 7] doesn't seem to affect his ability to go to Europe and so on.

THE COURT: It's amazing.

MR. KOENIGSKNECHT: Well, it's been a very long and frustrating bankruptcy process.

THE COURT: All right. We will recess until we get that printout so that we can make, put in a phone call to Mr. Silver. We will let you know when we are ready.

(Proceedings in chambers.)

THE COURT: Are we all set? Okay.

(Proceedings in chambers, Mr. Silver participating by telephone.)

THE COURT: Mr. Silver?

MR. SILVER: Yes, sir.

THE COURT: Okay. This is Judge Nordberg on our telephonic hearing here calling the case of Lincoln National Life, et al., versus Silver, case No. 86 C 7175, and

this hearing has been set up in response to a notice of motion and motion that has been filed for rescheduling the trial of the case noticed up for 11:30 today.

We have our court reporter taking all of this down.

Are you able to hear us okay?

MR. SILVER: Yes, you are clear.

THE COURT: All right. Now, let me just for the record, because the Court is taking judicial notice of this, we just ran another docket from the computer, and you remain, as [p. 8] you have for a number of years now, on the docket sheet as appearing pro se with your address at 524 Camino Del Monte Sol, Santa Fe, New Mexico 87501.

The docket entry, based on the minute order of January 26, 1993, now, that was entered on that date indicates that a final pretrial conference was held, final pretrial order and supplement entered, trial set for August 16th to August 27th on the indication there may be two weeks needed, and so on, and then it, there is an indication mailed notices.

The Court also now has had submitted to it a copy received by counsel for plaintiff at Gardner, Carton – I guess we should indicate, by the way, I haven't introduced – we'll have them speak to introduce themselves – we have the two counsel now for Lincoln National present here, and we will ask that each introduce yourselves for the record.

MR. KOENIGSKNECHT: Michael Koenigsknecht appearing for Lincoln National and Santa Fe Private Equity Fund II.

MR. MEYER: And Peter Meyer from Gardner, Carton & Douglas also appearing for both those parties.

THE COURT: All right. So from them, we have received a copy of the minute order of that date that was mailed to them and stamped receipted by them on – stamped received by their office on February 2nd, 1993.

Now, you have indicated in your motion that you did not receive that minute order, and is there anything that you [p. 9] wish to add to what you have already stated in your motion?

MR. SILVER: No, I didn't receive notice in February or at any time, and only by accident when Lincoln National filed its motion for decision on July 6th and indicated that it received the motion – excuse me – that it received the minute order on January 23rd, 1993, but today it said it received at [sic] on February 2nd, 1993.

THE COURT: That's the stamped receipt. All right.

On behalf now of plaintiffs in response to this motion for rescheduling the trial.

MR. KOENIGSKNECHT: Your Honor, we would simply add that we received in our office on May, or the first week of May of this year a letter from Mr. Silver where he indicates he's – he sent this letter to a senior partner in my firm, indicating he's writing a back [sic] called the Racketeering Trial of A. David Silver that is to be published in the fall and perhaps serialized in late summer. He was offer [sic] – and since his book contains charges in it pertaining to myself and Mr. Meyer, he was

offering our senior partners an opportunity for pre-publication comment.

This indicates that he was aware that the trial was occurring this summer; otherwise he wouldn't be able to publish his book about it in the fall.

And we would also note for the record that Mr. Silver apparently has received other notices and things since he has [p. 10] been pro se that have been mailed to him.

In addition, he notes in his motion that one of his objections is that he's purchased an airplane ticket to go to Europe. He doesn't say when the trip is scheduled, he doesn't say what airline, but all the airlines I am aware of will refund a ticket if you obtain either a doctor's order or a judge's order. If that is submitted to the airline, they usually do allow reschedule or refund. So I think that could be handled.

In addition, Lincoln has notified all of its witnesses of the trial dates, and the witnesses who are located, only one out of six or seven is located in Chicago. Two are on the West Coast, one is in Colorado, one is in Phoenix, one is in Chicago, one is in New Jersey, and they have all been notified and have the dates available for this trial, with the exception of one, Mr. Acker. He has the dates available, but he may have another problem that we can raise later, a health problem.

Finally, I don't think there is any prejudice to Mr. Silver because he still has at least, has over a month of notice of this trial. He can still get his subpoenas out, and, frankly, Lincoln has not been able to do a lot of its pretrial preparation until now simply because we are still waiting

to find out if it will be a jury or a bench trial, which would affect whether we would put a witness on or perhaps read into the record or submit testimony instead and how we prepare trial [p. 11] exhibits and demonstrative evidence. So we still have over a month to go and we don't think there is any prejudice.

THE COURT: All right. Just in reply now?

MR. SILVER: Well, I absolutely have sworn that I did not receive notice. The notice that I received was –

THE COURT: Well, you haven't sworn, but you have stated it in a pleading.

MR. SILVER: Right. I received notice by accident.

THE COURT: Oh, I will stand corrected. It shows a New York notary showing that you swore to the motion for rescheduling the trial on July 12th, 1993.

MR. SILVER: That's true.

THE COURT: So I take it you were in New York on that date.

MR. SILVER: I am. We rent our house in the summer, so I am in New York right now. I received notice only by accident. I may not have heard about the trial at all, which would have been a whole new set of problems. I do not have enough time to prepare for trial. Four of my witnesses are on vacation during that time or cannot be reached now because they have left for vacation, and I don't know when they are returning. I am still trying to reach each of my witnesses to find out if they will be on vacation in August.

THE COURT: What has been your problem in reaching your witnesses since you have known about this now since July [p. 12] the 6th?

MR. SILVER: Some of them are adversarial, don't want to talk to me. Eisenberg, for instance.

MR. KOENIGSKNECHT: Well, Mr. –

THE COURT: What efforts have you made so far since July the 6th then?

MR. SILVER: I have telephoned and faxed my witnesses.

MR. KOENIGSKNECHT: I can state, Your Honor, that Ivan Berk has received a fax, he's a former employee of Lincoln, who will be appearing at trial as a witness for the plaintiffs.

THE COURT: All right, so he'll be available for Mr. Silver as well then.

MR. KOENIGSKNECHT: Mr. Silver has also faxed Ian Rowland, the chairman and chief executive officer of Lincoln National, and requested his presence. As far as I am aware, no subpoenas have been issued at all; simply these faxed requests have gone out, which are obviously inadequate if people are outside the subpoena power.

MR. SILVER: I am in the process of finding process servers in the various cities and have identified I think four or five cities in which – and I am finding the costs of paying them and the witness fees and so forth of serving them. So I have notified my witness list – Bill Enlo, the president of Los Alamos National Bank and a

witness who will be on vacation at that time. Richard Dumler, another witness for me, has left [p. 13] for Europe or someplace outside the country, and he is an important witness for me, and I don't know when he will return. He's asked his office not to tell anyone. So he's a key witness. Andy Stevens of Provident Life in Chattanooga is checking his schedule to see if he can cut his vacation short, but he leaves the first week of August for vacation. And Sterling Beale of Stevens, Bruce, a witness in Columbia, South Carolina, will be on vacation.

As to vacation plans, I have purchased two nonrefundable tickets to Europe, and I had to prepay the Salzberg festival tickets and hotels in Austria. So I have lost, those are nonrefundable, and those are losses. And the cost of flying witnesses in to Chicago to appear more than doubles if I have to buy tickets on short notice for them versus having longer notice.

THE COURT: Well, you have got plenty of time for that.

MR. SILVER: But the –

THE COURT: All right. Any other arguments now that you wish to make that you haven't included in your written motion?

MR. SILVER: No. I am just amplifying on those arguments.

THE COURT: All right. Let me first of all state now that, based on our docket sheet, our computer setup, the [p. 14] mailings that have successfully been mailed to you, and the mailing that was received by counsel for plaintiff, the Court finds that you were mailed and did

receive notification of trial on or about February the 2nd of 1993.

This is an '86 case. It has taken this long for this case to come to trial. It is a case that should have come to trial long ago, and it seems to me that, with, even by your own admission, your knowledge of the case as of July the 6th provides more than sufficient notice for this case to be set and proceed to trial on the indicated August 16th date.

I will add to this. We will be getting this out shortly, but we have completed the research but not the writing yet, but we will be denying the motion by defendant for a jury trial that was filed six years after this case began for reasons that we will be indicating in the order. So it will be a bench trial.

That will be an advantage to the defendants for several reasons. First of all, it will make it sure that the defendant will be able to get all the evidence in that is relevant and should go in. It will avoid the problem, and this isn't the basis for it, but it will avoid the problem of a nonlawyer, even though there is obvious legal knowledge and skill that Mr. Silver has, but it will avoid the problem of a nonlawyer, nonexperienced jury trial lawyer seeking to try a jury case, which creates lots of problems. One of the [p. 15] advantages is that if, in good faith, a particular witness for the defendant is not able to be present during the time period that we have set, because it's a bench trial, we will be able to continue the hearing for a short period of time to permit the defendant to complete the presentation of his case to accommodate the fact that a witness may be out of the country or the like. But I am going require [sic] that there be affidavits filed to justify any

such continuance, but at least it's available where it would not be available for purposes of a jury trial.

Now, the fact that there still is a substantial period of time before this case comes to trial is important. It is important that you, Mr. Silver, now, proceed in the proper form for subpoenaing any witnesses that will not voluntarily come in, if they are within the subpoena power of the Court, so that we don't have any last minute problems about the presence of witnesses. And, again, the clerk of the court here will issue subpoenas to you on your request, and if you are having a problem on that, you should bring that to the Court's attention at this time so that we are able to follow through with arrangements so that you will be able to proceed as we had set back in January of '93.

Our final pretrial order and the rules of court indicate that once a final pretrial order is entered, and it was entered back at the end of January of '93, you are subject [p. 16] to trial – I think the notice that we state is on seven days notice. Even by your own admission, you have received far greater time period for that. But as I said, based on the computer, the success of prior mailings, the fact that this mailing was received by other counsel on the, in accordance with the listing in the computer, I have no reasonable doubt in my mind that you in fact did receive that notice.

Now, what you did after you received it, what your memory may be and the like, I'm not going to speculate on, but in my opinion due process has been more than satisfied. This is a very old case. It is absolutely vital in the interest of justice, I believe for everybody, that this

case finally come to trial and be concluded. So the Court denies the motion for a continuance. We are going to adhere to the previously, long previously scheduled trial date and plan to proceed beginning on August 16th of '93.

Are there any other matters now that you wish to raise or that we should deal with in the course of this hearing?

MR. SILVER: I have two. In Lincoln's motion for decision, it indicates that it received notice from the Court of the trial date on January 23rd. Was that just a typo?

MR. MEYER: That's not what our motion says. Our motion says that the order was entered on January 23rd.

THE COURT: Yes. That's when the final pretrial conference was held, and it was held on the record, and we went [p. 17] through – I believe it was – and we went through the final pretrial order and entered that final pretrial order and set the trial date.

MR. SILVER: Was I invited to that conference?

THE COURT: You certainly were. You said you couldn't make it, as I recall it. You have received notice for all of this. You have chosen not to come in, and we have accommodated you to the extent that we could, and we have accommodated you with this telephonic hearing here today.

MR. SILVER: Well, I don't –

THE COURT: But it's your choice that we are proceeding on this basis.

MR. SILVER: I don't recall that I –

THE COURT: What was that?

MR. SILVER: January 23rd was a Saturday? I am a little confused about that.

THE COURT: Well, I have the docket sheet here, and it's – January 26th is the date that I have for the minute order that was entered, January 26th of '93. That's when the final pretrial conference was held.

MR. KOENIGSKNECHT: Yes, 4:30 p.m..

THE COURT: And I should have received notice for that?

THE COURT: You did receive notice of that.

MR. SILVER: I did not receive notice of that.

[p. 18] THE COURT: Well, Mr. Silver, a lot of things have gone on in this case, but you were – you received a notice of that by mailed notice December 30th of 1992, and that again appears on the docket entry in this case. We have just run a complete docket that consists of 13 pages now with all of the court proceedings that have gone on.

MR. SILVER: The second issue, would you object if I filed a request, a request for leave to file an appeal?

THE COURT: You can't appeal this. This case is going to go to trial. You can't avoid trial any longer, and

you have still got plenty of time to get ready for it. You have had plenty of time since July 6th that we have a complete detailed final pretrial order. It has, of course, Magistrate Judge Weisberg has been working on this matter for a number of years. It is all prepared to go to trial. It will be going to trial. It will be before this Court as a bench trial. That will permit the Court to assist so that you will not run into procedural or technical difficulties in presenting your evidence or in the way you phrase questions or cross-examination and the like, so that it will clearly be, of course, on the record, and I think that even you will be satisfied that you will receive a fair trial starting on August the 16th.

As I say, if for some reason some witness of yours is physically not going to be able to appear during the two weeks that we have scheduled, the Court has scheduled for this trial, [p. 19] I do have the discretion and the power to continue the bench trial, that it's going to be done only with, as I said, by affidavit so that we are clear that this isn't being abused, but I can extend the time of the bench trial for you to bring in some witness that is not otherwise able to appear, but we are going to go continuing, continually through until we complete the trial of their case. The Court then is going to have the obligation to prepare an opinion in the case, which will be done, and other necessary procedures will be followed.

So there are a couple of other motions in limine to be ruled on, and those will be addressed and ruled on the first, or the week of the 9th of August, so that – and they will be sent out so that all of that preparatory work will be done, and we will be ready to start promptly at 10 o'clock on August 16th with the trial of the case.

Unless there are some other matters now that the Court should deal with, I think we have covered all of the current pending matters.

Do you have anything else that you wish to have considered, Mr. Silver, at this time?

MR. SILVER: I am just curious as to when my witnesses are most likely to appear.

THE COURT: All right. That's a good question.

How long do you anticipate your case in chief will be now?

[p. 20] MR. KOENIGSKNECHT: I expect we could complete it the first week, Your Honor.

THE COURT: We would anticipate that we should have at least five hours a day available. I have other matters set, but at least for purposes of planning, we would anticipate we could give you at least five hours a day.

MR. KOENIGSKNECHT: I hope we can have it substantially in by Friday, the 20th. We might go over a little bit onto the 23rd. Obviously part of it depends on the cross-examination of each of these witnesses. I can't control that.

THE COURT: All right. So you have heard that, Mr. Silver?

MR. SILVER: Yes.

THE COURT: That they anticipate that either they will finish on Friday or on Monday, subject obviously to the length of cross-examination.

MR. SILVER: I did hear that.

MR. MEYER: Your Honor, one point of clarification, with regard – now that this is a bench trial. With regard to depositions, are you going to want us to read the portions in or are you going to take those?

THE COURT: No. For any depositions that are to come into evidence, for the various reasons or by stipulation, I will read those. They aren't going to be read into the record. [p. 21] It's just a waste of time to do that. What I do require is that I receive any of that material the day before or the night before so I can read it overnight so I will have that in mind and will have that for use in connection with the other evidence to be presented the next day.

MR. KOENIGSKNECHT: Thank you, Judge.

THE COURT: Do you understand that, Mr. Silver?

MR. SILVER: No, you might explain it to me.

THE COURT: So if you have got some depositions of witnesses that you wish to offer into evidence because the witness is not available for appearance, either because of problem with the subpoena powers or illness or otherwise, you can offer the deposition transcript into evidence as the evidence in lieu of direct testimony of the witness in the trial, and I will read those myself. We won't physically take the time in court to read them orally because it's just a waste of time. I can read much faster than anybody can get through it.

Oh, that's right. I am reminded by my law clerk Eric Sacks that we have in the final pretrial order materials

required a color coding of any depositions to be read, and that is a very useful device. It saves everybody time and speeds up the whole process of the preparation of any deposition transcript –

MR. MEYER: Yes, Your Honor.

[p. 22] THE COURT: – for introduction and reading by the Court.

MR. MEYER: Your Honor, in fact, we sent three depositions already to Mr. Silver with our designations.

THE COURT: All right. So he already has that, all right.

Anything else that we should cover at this time?

MR. SILVER: Yes. I would like to be able to send you a request to mail a court order to Delta Airlines and two hotels and the Salzberg Festival so I can try to get my money back.

THE COURT: Yes, I will be pleased to do that. We will be entering a minute order today's date, and I will try to – I would like to be helpful to you. I will try to make it – maybe it would be better to send a letter so that I don't have to – they won't – we won't be adding information about prior knowledge and the like. So if you will send me the individuals to do that, that should receive it, we'll be sending letters then. I am going to be gone on vacation, we'll have to ship them up to me, and then I'll sign them, and we'll send them back down.

MR. SILVER: I can supply envelopes.

THE COURT: We'll, we'll have the envelopes, so they will just be sending them in a packet up to me at

where I will be on vacation, and then I'll sign those and send those off.

[p. 23] MR. SILVER: All right.

THE COURT: So we will do that as soon as we receive the information from you.

MR. SILVER: Do you require that I send postage along?

THE COURT: No, no.

MR. SILVER: Some are to Austria.

THE COURT: No, we won't require anything like that.

MR. SILVER: Thank you.

THE COURT: This is part of the Court case, we'll consider that.

Any other matters to be covered at this time?

MR. KOENIGSKNECHT: I don't think so, Judge.

THE COURT: All right. That will conclude the proceeding then, and we will adjourn this hearing then with respect to Lincoln National versus Silver, case No. 88 C 7175. Thank you all very much.

MR. KOENIGSKNECHT: Thank you, Judge.

MR. MEYER: Thank you.

(Proceedings concluded.)

CERTIFICATE

I, Michael P. Snyder, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable JOHN A. NORDBERG, one of the judges of said Court, at Chicago, Illinois, on July 15, 1993.

/s/ Michael P. Snyder
Official Court Reporter
United States District Court
Northern District of Illinois

APPENDIX 6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, an Indiana Corporation, in its individual capacity and as assignee of the SANTA FE PRIVATE EQUITY FUND, II, L.P., a New Mexico limited partnership, Plaintiff, v. A. DAVID SILVER, ADS PARTNERS, L.P., a New Mexico limited partnership, Defendants.	No. 86 C 7175 Judge John A. Nordberg Magistrate Judge Weisberg

MEMORANDUM IN SUPPORT OF
A JURY TRIAL

(Filed Nov. 16, 1992)

Defendant, A. David Silver ("Silver") submits this Memorandum In Support Of A Jury Trial.

I. INTRODUCTION

Initially, it must be brought to the Court's attention that Lincoln National Life Insurance Company ("Lincoln") by its attorneys has submitted a memorandum of law in opposition to Silver's motion for jury trial. Silver has not made any motion for jury trial, since a timely

general jury demand was made on June 1, 1987 and this case has been docketed for jury trial at all times since that date on the Court's own docket sheets for this case, Docket No. 86 7175. (See attached as Exhibit A copies of Court's Civil Docket Sheet – Cover sheets and page 4). In the upper right hand corner of both of the Cover Sheets the case is marked "D" for jury demand. Further, on page 4 of the Docket Continuation Sheet at 06/03/87 it shows that a jury demand was filed on 06/01/87. Therefore, the proper procedure in this case would be for Lincoln to file its own motion to strike the jury demand which has been on file since June 1, 1987.

Although Lincoln has failed to follow the proper procedure in this case by bringing its own motion to strike, Silver will nonetheless proceed as if the proper procedure had been followed by Lincoln and set out why Silver is entitled to a jury trial of this matter.

II. ARGUMENT

A. Silver Is Entitled To A Jury Trial

Rule 38(b) of the Federal Rules of Civil Procedure states:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencment of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

Fed. R. Civ. P. 38(b). In this case the "last pleading," the Answer of defendants A. David Silver and ADS Partners, L. P. was filed on May 21, 1987. On June 1, 1987, ten days later, Silver filed a Counterclaim and a general jury demand. In accord with the rules, jury demand was "endorsed upon a pleading of party." In this case the general jury demand was endorsed upon the counterclaim, but in no way was limited to the counterclaim.

In this case Silver had previously filed a Motion to Dismiss. However, the ten day period begins running after the answer is filed. *In re Kaiser Steel Corp.*, 911 F.2d 380 (C.A. 10 1990). As in the case at bar, the court found that where a demand for a jury trial was filed at the same time as the answer to the complaint was filed was timely, even though the party had previously filed a motion to dismiss. This Court has similarly found that the "last pleading" is the pleading that contests the issue, which is the answer to the complaint. *Horwitz v. Alloy Automotive Co.*, 677 F.Supp. 564 (N. D. Ill. 1988).

In *Horwitz*, this Court further found that where a jury demand is made without specifying particular issues, the demand will be interpreted as a demand for jury trial on all issues in the case triable by jury. Since the demand for jury trial in the case at hand did not specify any particular issues, it will be "interpreted as a demand for jury trial on all issues in the case triable by jury." *Id.* at 564.

B. Silver's Right To A Jury Trial Should Be Upheld Even If The Court Does Not Find Strict Adherence To Rule 38

Silver's right to a jury trial is found in the Seventh Amendment to the U. S. Constitution. U.S.C.A. Const. 7th Amendment. Therefore, this Court should give great weight in any balancing of equities in favor of Silver's constitutional right to a jury trial.

In *Bates v. Board of Regents of Northern New Mexico Community College,* 122 F.R.D. 586 (D.N.M. 1987), the court upheld the right to a jury trial even though the party failed to make a timely jury trial demand, where the opposing party failed to present strong and compelling reasons in support of their opposition. In this case, Lincoln simply states that it would be prejudiced, but gives absolutely no reason for this prejudice, let alone "strong and compelling" reason(s). Certainly, Lincoln gives no reason or reasons because the general jury demand was made in June 1987. They can have no reason for prejudice because this case has been docketed for jury trial for over five years. Even if Lincoln could argue any prejudice for a supposed lack of technical compliance with Rule 38, they have had ample opportunity to raise that issue in a motion to strike the jury demand at some point in the last five years. Lincoln's effort to raise this issue now, right before trial, is simply an attempt to divert Silver's attention from the real issues.

In *Daniel Intern. Corp. v. Fischbach & Moore, Inc.,* 916 F.2d 1061, rehearing denied 921 F.2d 273 (1988), the court denied a party's motion to strike a jury demand as untimely although the opposing party had delayed over

four months in filing its jury demand because there was no opposition to the jury demand when it was filed and the case had been on the jury calendar for almost seven months before the motion to strike was made and the jury trial demand was made eighteen months before trial. In this case, Lincoln's first objection to the jury trial demand made June 1987 was in November 1992 – after the case had been docketed for jury trial for almost five and one half years and at least five and one half years before trial. Clearly, the equities must be balanced in favor of Silver where Lincoln has waited over five years to interject any opposition whatsoever to Silver's constitutional right to jury trial.

Perhaps Lincoln will argue in its reply memorandum that a five and one half year delay in interjecting its opposition to Silver's jury trial right resulted because it just came to Lincoln's attention now, in the fall of 1992, that the case was set for jury trial. However, as Lincoln is certainly represented by competent counsel, and that counsel is well aware that a general jury demand, not specific to any issue, will be deemed a jury demand to each and every issue triable by right to a jury. Furthermore, Lincoln's counsel is certainly aware of the docketing system for the Northern District of Illinois Federal Court. In the last five and one half years that this case has been docketed for jury trial, Lincoln's competent counsel could have caught the jury trial docket notation and interjected some opposition.

III. CONCLUSION

For the reasons stated, A. David Silver respectfully requests that his constitutional right to a trial by jury be upheld.

/s/ A. David Silver
A. DAVID SILVER

A. DAVID Silver
524 Camino del Monte Sol
Santa Fe, New Mexico 87501
505-983-1769

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing NOTICE OF FILING, and SILVER'S MEMORANDUM IN SUPPORT OF A JURY TRIAL were served upon:

Michael J. Koenigsknecht
Gardner, Carton & Douglas
Suite 3400 – Quaker Tower
321 North Clark Street
Chicago, IL 60610

by messenger on November 16, 1992.

/s/ Joellyn Nelson
(Attorney at Law)

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, an Indiana Corporation, Plaintiff, vs. A. DAVID SILVER, ADS PARTNERS, L.P., a New Mexico Limited Partnership, SANTA FE PRIVATE EQUITY FUND II, L.P., a New Mexico Limited Partnership, and THE FIRST NATIONAL BANK OF BOSTON, a Massachusetts Corporation, Defendants.	No. 86 C 7175 Judge Susan Getzendanner Trial by Jury Demanded

COUNTERCLAIM

Defendants-counterclaimants A. David Silver ("Silver") and ADS Partners, L.P. ("ADSP"), by their attorneys, and for their counterclaim against plaintiff-counterdefendant The Lincoln National Life Insurance Company ("Lincoln"), state as follows:

Parties

1. Silver is an individual and a resident of the State of New Mexico. At all times relevant to the allegations herein, Silver was engaged in the venture capital business and is the managing general partner of ADSP.

2. ADSP is a New Mexico limited partnership with its principal place of business in Santa Fe New Mexico. At all times relevant to the allegations herein, ADSP was the general partner in defendant Santa Fe Private Equity Fund II, L.P., a New Mexico limited partnership (herein "SFPEF II").

3. Lincoln is an Indiana corporation with its principal place of business in Fort Wayne, Indiana. Lincoln is a subsidiary of Lincoln National Corporation, which is also the parent corporation of Lincoln National Investment Management Company ("LNIMC"). Ivan Berk, a vice president of LNIMC, was, at all times relevant herein, acting as an authorized agent for Lincoln.

Jurisdiction

4. This counterclaim arises out of the same transactions and occurrences alleged in Count IV and the other Counts of Lincoln's Amended Complaint herein against Silver, ADSP, SFPEF II and The First National Bank of Boston and is therefore compulsory under Fed. R. Civ. P. 13(a). The Court's jurisdiction of this counterclaim is granted by the doctrine of ancillary jurisdiction.

Facts

5. Silver has been engaged in the venture capital business for over 20 years and is widely known and highly respected in that business. Silver has also written a number of books and articles on the subject of venture capitalism which are used as instructional material in the venture capital industry and in numerous business schools.

6. In 1985, Silver and Jesse L. Acker and a number of other investors formed ADSP as a New Mexico limited partnership. Silver is the managing general partner of ADSP.

7. On or about August 1, 1985, ADSP and a number of other investors, including Lincoln, agreed to and did form a venture capital limited partnership called SFPEF II. A copy of the Agreement of Limited Partnership is attached to Lincoln's Amended Complaint and a copy is attached hereto as Exhibit A (herein the "SFPEF II Agreement"). The purpose of the limited partnership was to realize capital appreciation through investments "in start-ups, early stage ventures, developmental stage companies, medium size companies, and in any other investments consistent with and similar to the foregoing as the General Partner may determine." (Exh. A, ¶3). Under the terms of the SFPEF II Agreement, ADSP is the sole general partner.

8. Pursuant to Section 4 of the SFPEF II Agreement, ADSP and Lincoln and the other limited partners agreed to contribute capital to SFPEF II in the amounts stated in the Agreement. Lincoln agreed to contribute a total of $2 Million to SFPEF II in accordance with the terms of the

Agreement. The parties to the SFPEF II Agreement agreed that one-quarter of each partner's total capital commitment would be contributed initially upon execution of the Agreement and pursuant to the terms and conditions of Section 4(a) of the Agreement. The parties further agreed that the balance of each partner's capital commitment would be "contributed in such installments and at such times as the General Partner shall determine from time to time upon notice to the Partners ('Call Notice'). . . . " (Exh. A, ¶4(a)). Lincoln and the other partners made their respective initial capital contributions to SFPEF II on or about August 5, 1985.

9. The parties to the SFPEF II Agreement further agreed that the General Partner "shall have the sole and exclusive control of the management of the Partnership and the conduct of the business of the Partnership" and the power to "direct the formulation of investment policies and strategies of the Partnership. . . . " (Exh. A, ¶¶6(a),(h),(1)). The parties further agreed that "the Limited Partners shall not participate in management." (Exh. A, ¶6(a)).

10. In August, 1985, Lincoln, through its agent Ivan Berk, agreed to serve on the Advisory Committee of SFPEF II. The duties and powers of the Advisory Committee and limitations thereon are set forth in Section 14(k) of the SFPEF II Agreement which provides, among other things, that: "The Advisory Committee shall take no part in the control or management of the Partnership business, nor shall the Advisory Committee have any

power or authority to act for or on behalf of the Partnership. All investment decisions, as well as all responsibility for the management of the Partnership, shall rest with the General Partner."

11. The first meeting of the Advisory Committee of SFPEF II took place in February 1986. Prior to the meeting, each of the members of the Committee, including Lincoln, were provided with a report on the activities of SFPEF II, including an outline of the investments made and unaudited financial statements. Lincoln did not attend the meeting but was informed of the proceedings by telephone. At and following this meeting, the Committee, including Lincoln, insisted that the general partner, ADSP, make no further investments of SFPEF II funds in certain companies including certain computer-related companies, which investments had previously been made by ADSP and were permitted by the SFPEF II Partnership Agreement. ADSP objected to this position of the Advisory Committee but was forced to and did acquiesce in it.

12. The second meeting of the Advisory Committee took place on May 5, 1986 and Lincoln attended. At this meeting, Silver and ADSP outlined a strategy for a work-out for certain of the portfolio companies in which SFPEF II had made an investment and which were then in financial difficulty and outlined SFPEF II's fund-raising activities. Lincoln raised no objection to the work-out strategy or to the fund-raising activities.

13. On or about June 30, 1986, ADSP gave notice of the second capital call to all limited partners including Lincoln, whose call was for $500,000.

14. At the request of ADSP and SFPEF II, Lincoln had agreed in November 1985 to pay its second SFPEF II capital call to The First National Bank of Boston ("FNB of Boston") as security for and inducement to FNB of Boston to make a loan to SFPEF II. On or about July 8, 1986, after it had received notice from ADSP of a second capital call, Lincoln reaffirmed to FNB of Boston its commitment to pay its second capital call to FNB of Boston.

15. In late August, 1986, Lincoln informed FNB of Boston that it would delay making its second capital contribution and asserted that ADSP and Silver purportedly had breached the SFPEF II Agreement and had mismanaged the funds of SFPEF II. At all times thereafter, Lincoln has failed and refused to pay its second capital contribution to FNB of Boston or to SFPEF II and failed and refused to make any further capital contributions to SFPEF II.

16. As a direct result of Lincoln's failure to pay its second capital call to FNB of Boston or to SFPEF II and its statements and assertions to FNB of Boston alleged in Paragraph 15 herein, FNB of Boston sought to enforce SFPEF II's loan obligation to FNB of Boston by obtaining writs of attachment on bank accounts of SFPEF II, ADSP and Silver. The initiation of the attachments was publicized in the Santa Fe, New Mexico, newspaper. Said attachments prevented ADSP and Silver from using funds from those accounts for a period of about two weeks, after which the attachments were vacated by a state court as wrongfully issued. Lincoln was informed of said attachments but continued to refuse to make its second capital contribution.

17. On September 8, 1986, the Advisory Committee of SFPEF II held its third meeting and Lincoln attended by its agents Ivan Berk. At this meeting, Lincoln declined to advise the Committee as to the reasons it refused to make its second capital contribution but continued to refuse to make its second capital contribution as required by the SFPEF II Agreement.

18. On or about September 23, 1986, Lincoln filed its complaint in this case alleging securities fraud and breach of fiduciary duty by ADSP, Silver and SFPEF II. Lincoln sent a copy of its complaint to all the other limited partners of SFPEF II. Following this mailing by Lincoln and as a direct result thereof, three additional limited partners of SFPEF II refused to make their second capital contribution.

19. Lincoln, alone and in combination with certain other limited partners in SFPEF II, blocked the implementation of plans developed by Silver and ADSP which were designed to aid certain SFPEF II portfolio companies, in which SFPEF II had invested, to work out their respective financial difficulties and thereby to preserve capital of the fund for the benefit of all partners.

Count I
Breach of Contract

20. Silver and ADSP repeat and reallege their allegations of paragraphs 1 through 19 herein.

21. Lincoln knew or could have reasonably foreseen at the time it entered into and executed the SFPEF II Agreement that a failure and refusal to pay capital contribution installments when due would adversely affect

ADSP, as the general partner of SFPEF II, and Silver, as the managing general partner of ADSP, because, among other things, creditors and portfolio companies of SFPEF II would look to ADSP and Silver if SFPEF II had insufficient capital to meet its obligations.

22. Lincoln breached its obligations under the SFPEF II Agreement by failing and refusing without justification to make its second capital contribution and by interfering with ADSP's right to manage the business of SFPEF II and to make investment decisions for SFPEF II.

23. ADSP and Silver have performed all their obligations under the SFPEF II Agreement.

24. The foregoing breaches of the SFPEF II Agreement by Lincoln have directly damaged and injured ADSP and Silver, as general partner of ADSP, in the following respects: (a) the bank accounts of ADSP and Silver were wrongfully attached and ADSP and Silver were deprived of funds and forced to incur legal costs to remove the attachments; (b) ADSP and Silver were prevented from discharging their obligations to manage the business of SFPEF II and to make investment decisions on behalf of SFPEF II; (c) ADSP and Silver were forced to use their own funds to pay or guarantee payment of the obligations of SFPEF II to its creditors and portfolio companies and to pay other expenses of SFPEF II, in order to continue the operation of SFPEF II for the benefit of the other partners; and (d) certain portfolio companies of SFPEF II were deprived of funds for their continued operation, thereby diminishing the value of each partner's interest in SFPEF II, including ADSP.

25. ADSP has been damaged as a result of the foregoing breaches of contract by Lincoln in an amount yet to be determined but in excess of $100,000.

26. Silver has been damaged as a result of the foregoing breaches of contract by Lincoln in an amount yet to be determined but in excess of $100,000.

WHEREFORE, counterclaimants Silver and ADS demand judgment against plaintiff Lincoln in the amount of damages actually suffered by them, plus interest, costs and attorneys' fees.

Count II
Breach of Contract – Punitive Damages

27. Silver and ADSP repeat and reallege the allegations of paragraphs 1 through 19 and 21 through 23 herein.

28. Lincoln's actions in failing and refusing to pay its second capital contribution were done intentionally, maliciously, willfully, wantonly, in bad faith, with reckless disregard for the rights of Silver and ADSP, without any authorization and with the intent to adversely affect the business and reputation of Silver and ADSP in order to obtain an improper advantage.

29. Silver and ADSP are entitled to punitive damages in an amount of $2,000,000.

WHEREFORE, counterclaimants Silver and ADSP demand judgment against plaintiff Lincoln for punitive damages in the amount of $2,000,000.

Count III
Inducing Breach of Contract

30. Silver and ADSP repeat and reallege the allegations of paragraphs 1 through 19 and 21 through 23 herein.

31. Lincoln by its foregoing actions, particularly those alleged in paragraphs 11, 17, 18 and 19 has induced other limited partners in SFPEF II to fail and refuse to make their respective second capital contributions to SFPEF II in breach of their respective obligations under the SFPEF II Agreement and induced other limited partners to interfere with ADSP's right to manage the business of SFPEF II and to make investment decisions for SFPEF II.

32. The foregoing inducements by Lincoln to other limited partners to breach their obligations under the SFPEF II Agreement have directly damaged and injured ADSP and Silver, as general partner of ADSP, in the following respects: (a) ADSP and Silver were prevented from discharging their obligations to manage the business of SFPEF II and to make investment decisions on behalf of SFPEF II; (b) ADSP and Silver were forced to use their own funds to pay or guarantee payment of obligations of SFPEF II to its creditors and portfolio companies and to pay other expenses of SFPEF II, in order to continue the operation of SFPEF II for the benefit of the other partners; and (c) certain portfolio companies of SFPEF II were deprived of funds for their continued operation, thereby diminishing the value of each partner's interest in SFPEF II, including ADSP.

33. ADSP has been damaged as a result of the breaches of contract induced by Lincoln in an amount yet to be determined but in excess of $100,000.

34. Silver has been damaged as a result of the foregoing breaches of contract induced by Lincoln in an amount yet to be determined but in excess of $100,000.

WHEREFORE, counterclaimants Silver and ADSP demand judgment against plaintiff Lincoln in the amount of damages actually suffered by them, plus interest, costs and attorney's fees.

Count IV
Business Libel

35. Silver and ADSP repeat and reallege the allegations of paragraphs 1 through 19 herein.

36. The statements and assertions by Lincoln to FNB of Boston alleged herein in paragraph 15 were false and were known to be false by Lincoln at the time they were made, and were made by Lincoln intentionally and without justification, or with reckless or negligent disregard for the truth of such statements and assertions. Said statements and assertions directly impugned the integrity of Silver and prejudiced Silver and ADSP in their business as venture capitalists.

37. The allegations of securities fraud and breach of fiduciary duties alleged by Lincoln in its complaint herein are false and were known by Lincoln to be false at the time they were made and when they were publicized by Lincoln to the other limited partners of SFPEF II. Said allegations accused Silver and ADSP of committing a

crime and directly impugned the integrity of Silver and prejudiced Silver and ADSP in their business as venture capitalists.

38. Lincoln knew of and did not object to any of the investments of SFPEF II at the time those investments were made in 1985. While it later purported to object in early 1986 to the quality of certain of those investments, Lincoln continued thereafter for several months to serve as an advisor to SFPEF II and reviewed and approved fund-raising activities for SFPEF II by Silver and ADSP. At no time between the time it learned of those investments until it publicized its charges to the limited partners in the Fall of 1986 did Lincoln claim or suggest that ADSP or Silver or SFPEF II had committed securities fraud purportedly because they or any of them had invested SFPEF II funds in a manner inconsistent with alleged representations made to Lincoln or others at or prior to the time Lincoln agreed to become a limited partner in SFPEF II. Said securities fraud allegations have no substance and were made by Lincoln for the purpose of attempting to justify Lincoln's refusal to make further capital contributions to SFPEF II in violation of its obligations under the SFPEF II Agreement.

39. The publication to the other limited partners of Lincoln's false charges of securities fraud and breach of fiduciary duties by Silver and ADSP was made by Lincoln intentionally and without justification or with reckless or negligent disregard for the truth of those allegations.

40. The foregoing conduct by Lincoln has injured and damaged ADSP and Silver and constitutes business libel.

41. Silver and ADSP have been damaged by Lincoln's foregoing business libel in the following respects: (a) Silver's reputation and profession as a venture capitalist has been destroyed; (b) Silver and ADSP have been prevented from discharging their obligations to manage the business of SFPEF II and to make investment decisions on behalf of SFPEF II; (c) Silver and ADSP have been forced to expend their own funds to pay or guarantee payment of the obligations of SFPEF II to its creditors and portfolio companies and to pay other expenses of SFPEF II, in order to continue the operation of SFPEF II for the benefit of the other partners; (d) Silver and ADSP have been forced to expend their own funds to attempt to implement a plan to work out the financial difficulties of certain SFPEF II portfolio companies in order to attempt to protect SFPEF II's investment in those companies; (e) certain portfolio companies of SFPEF II were deprived of funds for their continued operation, thereby diminishing the value of each partner's interest in SFPEF II, including ADSP; (f) the bank accounts of Silver and ADSP were wrongfully attached by FNB of Boston; (g) Silver and ADSP have been forced to defend this and other lawsuits that were precipitated by Lincoln's actions; and (h) Silver has suffered an impairment of his reputation and his standing in the community and severe mental and emotional distress.

42. Silver has been damaged in an amount as yet undetermined but in excess of $1,000,000.

43. ADSP has been damaged in an amount as yet undetermined but in excess of $100,000.

WHEREFORE, counterclaims Silver and ADSP demand judgment against plaintiff Lincoln in the amount of damages actually suffered by Silver and ADSP, plus interest, costs and attorneys' fees and punitive damage in the amount of $1,000,000.

Count V
Business Libel – Punitive Damages

44. Silver and ADSP repeat and reallege the allegations of paragraphs 1 through 19 and 38 herein.

45. The foregoing statements and assertions by Lincoln to FNB of Boston and its allegations of securities fraud and breach of fiduciary duties which it publicized to the other limited partners were false. Lincoln published those allegations intentionally and with knowledge of their falsity or in reckless disregard for the truth of such allegations and assertions.

46. Silver and ADSP are entitled to an award of punitive damages in an amount of $2,000,000.

WHEREFORE, counterclaimants Silver and ADSP demand judgment against plaintiff Lincoln for punitive damages in the amount of $2,000,000.

Count VI
Disparagement

47. Silver and ADSP repeat and reallege the allegations of paragraphs 1 through 19, 36 through 39 and 41 herein.

48. The foregoing acts of Lincoln demeaned and impugned the quality of the services offered by Silver and ADSP and constitute a violation of Section 2(8) of the Illinois Deceptive Trade Practices Act (Ill. Rev. Stat. ch. 121 1/2, §312(8)) and Section 2 of the Illinois Consumer Fraud and Deceptive Practices Act (Ill. Rev. Stat. ch. 121 1/2, §262). Silver and ADSP are entitled to recover damages by reason of these violations under Section 10a of the Consumer Fraud Act. (Ill. Rev. Stat. ch. 121 1/2, §270a).

49. Silver has been damaged in an amount as yet undetermined but in excess of $1,000,000.

50. ADSP has been damaged in an amount as yet undetermined but in excess of $100,000.

WHEREFORE, counterclaimants Silver and ADSP demand judgment against plaintiff Lincoln in the amount of damages actually suffered by Silver and ADSP, plus interest, costs and attorneys' fees.

COUNTERCLAIMANTS SILVER AND ADSP DEMAND TRIAL BY JURY.

DATED: June 1, 1987

A. David Silver and
ADS Partners, L.P.

By: /s/ Joseph V. Giffin
One of the Attorneys for
Defendants, A. David Silver and ADS Partners, L.P.

OF COUNSEL:
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APPENDIX 8

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CAUSE: PLAINTIFFS DEFENDANTS

	PLAINTIFFS		DEFENDANTS
(P-1)	THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, an Indiana Corporation	(D-	BB A. DAVID SILVER, ADS PARTNERS, L.P.,
		(D-	A New Mexico Limited Partnership SANTA FE PRIVATE EQUITY FUND II, L.P.,
		(D-	a New Mexico Limited Partnership, and THE FIRST NATIONAL BANK OF BOSTON, a Massachusetts corporation, Limited Partnership

FIRST NATIONAL BANK OF BOSTON

Counter-defendant
11/18/86

John Clark as receiver for Santa Fe 07/27/87
Counter-plaintiff

VS.

The Lincoln National Life Insurance Co.,
Counter
defendant 07/27/87

Counter-plaintiff
11/18/85

SANTA FE PRIVATE EQUITY FUND
Counter-plaintiff
02/04/87

A. DAVID SILVER ADS PARTNERS, L.P.
Counter-plaintiff
06/01/87

vs.

THE LINCOLN NATIONAL LIFE INSURANCE CO.
Counter-defendant
06/01/87

MAGISTRATE GOTTSCHALL
(Referred 2/13/89)
CAUSE (CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE

15 USC 78(a)(a) – Securities Exchange Act – Investment Fraud

JUDGE NORDBERG

REFERRED TO MAG. WEISBERG

02/24/89 3/16/89

(P-1) THE LINCOLN LIFE INSURANCE COMPANY, an Indiana Corporation, in its individual Corporation, in its individual capacity and as assignee of the SANTA FE PRIVATE EQUITY FUND II L.P., a New Mexico limited partnership

vs

(D-1) SILVER, A. David
(D-2) ADS PARTNERS, L.P., a New Mexico limited partnership
(D-3) ARTHUR YOUNG & COMPANY
(D-4) DEWALD, Phillip J.
(D-5) BOOS, Al
(D-6) JONES, Reta D.
(D-7) MEYER, Kirk
(Second Amended Complaint 08/26/88)

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Gregory J. Bueches
(05/07/90 Order)

-

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PLAINTIFFS	DEFENDANTS
(P-1) THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, an Indiana Corporation	(D-BB A. DAVID SILVER, DAS PARTNERS, L.P., (D- A New Mexico Limited Partnership SANTA FE PRIVATE EQUITY FUND II, L.P., (D- a New Mexico Limited Partnership, and THE FIRST NATIONAL BANK OF BOSTON, a Massachusetts corporation, Limited Partnership

FIRST NATIONAL BANK OF BOSTON

Counter-defendant
11/18/86

John Clark as receiver for Santa Fe 07/27/87
Counter-plaintiff

VS.

The Lincoln National Life Insurance Co.,
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defendant 07/27/87

Counter-plaintiff
11/18/85

SANTA FE PRIVATE EQUITY FUND
Counter-plaintiff
02/04/87

A. DAVID SILVER ADS PARTNERS, L.P.
Counter-plaintiff
06/01/87

vs.

THE LINCOLN NATIONAL LIFE INSURANCE CO.
Counter-defendant
06/01/87

MAGISTRATE GOTTSCHALL
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CAUSE (CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE

15 USC 78(a)(a) – Securities Exchange Act – Investment Fraud

JUDGE NORDBERG

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[ ] CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS

FILING FEES PAID

DATE
9/23/86

(Substituted 09/22/88)

RECEIPT NUMBER
207 390 60.00

PLAINTIFF
LINCOLN NATIONAL LIFE INSURANCE

DEFENDANT
SILVER, A. DAVID et al

DOCKET NO. 86C7175

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DATE	NR.	PROCEEDINGS
05/04/87 RGT	58	Filed 05/01/87: Plaintiff's notice of deposition of Kyle Lefkoff pursuant to subpoena duces tecum.
05/06/87	59	Filed 05/05/87: Appearances of Michael D. Sher and Andrew G. Neal as attorneys for defendant Santa Fe Private Equity Fund II, L.P.
	60	Filed 05/05/87: Rule 39 affidavit for Mr. Sher.
RGT	61	Filed 05/05/87: Rule 39 affidavit for Mr. Neal.
05/08/87	62	Minute Order of 05/07/87: Michael Connelly, Joseph Giffin and Mary Gilhooly given leave to substitute as counsel for defendants A. David Silver and ADS Partners. Counsel given leave to file their appearances. Defendants' motion for protective Order regarding the deposition of Kyle Lefkoff heard. Defendants A. Silver ADS Partners and Santa Fe Private Equity Fund given to May 21, 1987 to answer count 4. Status hearing held and continued to 1 July 87 at 9:30 a.m. Getzendanner, J. Notices mailed 05/08/87

	63	Filed 05/05/87: Notice of Motion; Motion for substitution of counsel.
	64	Filed 05/06/87: Notice of Motion; Motion for protective order.
	65	Filed 05/07/87: Appearances of Michael P. Connelly, Joseph V. Giffin and Mary C. Gilhooly as attorneys for A. David Silver and ADS Partners, L.P.
	66	Filed 05/07/87: Rule 39 affidavit for Mr. Connelly.
	67	Filed 05/07/87: Rule 39 affidavit for Mr. Giffin.
RGT	68	Filed 05/07/87: Rule 39 affidavit for Ms. Gilhooly.
05/22/87 RGT	69	Filed 05/21/87: Notice of filing; ANSWER of defendants A. David Silver and ADS Partners, L.P. to Count IV of the Amended Complaint.
05/22/87	70	Minute Order of 05/22/87: Defendants A. David Silver and ADS Partners motion for an extension of time to June 1, 1987 to file counterclaims is granted. Getzendanner, J. Notices mailed 05/22/87.
RGT	71	Filed 05/20/87: Notice of motion; Motion of defendants for extension of time to file counterclaims.
06/03/87 HP	72	Filed 06/01/87: Defendants notice of filing; COUNTERCLAIM of defendants-counterclaimants A. Divid [sic] Silver and ADS Partners, L.P.; Jury demand; Exhibit A.
06/09/87	73	Minute order of 06/05/87: Parties directed to have Rule 12d conference

		on defendant the First National Bank of Boston's motion for order compelling the depositions of Ivan Berk, Max Roesler and David Martin. Getzendanner, J. No notice required.
	74	Filed 06/03/87: Defendant's notice of motion.
HP	75	Filed 06/03/87: Motion; Attachments.
		* * *
4/3/92	419	MOTION by defendant A David Silver for leave to additional authority to Silver's motion for summary judgment (Attachment) ; notice of filing. (vkd) [Entry date 04/06/92]
6/23/92	420	MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION concerning defendant Silver's motion for summary judgment (sm) [Entry date 06/24/92]
6/23/92	421	MINUTE ORDER of 6/23/92 by Hon. Bernard Weisberg : Enter Magistrate Judge's Report and Recommendation on defendant Silver's motion for summary judgment. It is recommended that Silver's motion for summary judgment and Lincoln's request that summary judgment be entered in its favor on the statute of limitations issue be denied. It is also recommended that Silver's unopposed motion for leave to file the affirmative defense of statute limitations to Count I and III of the complaint be granted notice (sm) [Entry date 06/24/92]
9/1/92	423	MINUTE ORDER of 9/1/92 by Hon. John A. Nordberg : This Court has

reviewed the parties' submissions on the statute of limitations question and agrees with the magistrate judge's Report and Recommendation. Accordingly, the Court accepts and adopts the Report and Recommendation, which is attached to this order. Denying motion for leave to additional authority to Silver's motion for summary judgment [419-1]. Denying motion for leave to file additional authority to Silver's motion for summary judgment [418-1]. Lincoln's request for judgment in its favor (which was made without the appropriate submissions under Rule 56(c) and the local rules). Granting motion for leave to file the additional affirmative defense of statue [sic] of limitations [412-1] (Attachment). (See reverse of minute order). Mailed notice (sm) [Entry date 09/02/92]

9/2/92	424	MINUTE ORDER of 9/2/92 by Hon. Bernard Weisberg : Joint final pretrial order to be filed in room 1870 by 11/2/92. Status hearing magistrate set for 11/12/92 at 10:00 am. Mailed notice (sm) [Entry date 09/03/92]
10/29/92	425	LETTER from A. David Silver dated 10/28/92. (sb) [Entry date 10/30/92]
10/30/92	426	MINUTE ORDER of 10/30/92 by Hon. Bernard Weisberg: Defendant's request for an extension of time to submit a brief as to why this matter should be determined by a jury as it is currently docketed is granted. Parties to agree on a briefing schedule and advise the

		court of the dates. Mailed notice. (sb) [Entry date 11/02/92]
11/5/92	427	MOTION by plaintiff for leave to file a trial memorandum in excess of fifteen pages; notice of motion. (sb) [Entry date 11/06/92]
11/5/92	428	MINUTE ORDER of 11/5/92 by Hon. Bernard Weisberg: Plaintiff's motion for leave to file a trial memorandum in excess of fifteen pages [427-1] is granted. No notice. (sb) [Entry date 11/06/92]
11/12/92	429	MOTION by plaintiff for leave to designate additional documents prior to trial; notice of motion. (sb)
11/12/92	–	ORAL MOTION by defendant for leave to list an additional exhibit. (sb)
11/12/92	430	MINUTE ORDER of 11/12/92 by Hon. Bernard Weisberg: Status hearing held. Plaintiff's motion for leave to designate additional documents prior to trial [429-1] is granted without objection. Defendant's oral motion for leave to list an additional exhibit [0-1] is granted without objection. Defendant's responses to plaintiff's motions in limine, defendant's trial brief and the additional submissions referred to in open court due 11/30/92. Telephone conference set for 12/17/92 at 2:00 p.m. Mailed notice. (sb)
11/16/92	431	MEMORANDUM by defendant A. David Silver in support of a jury trial (Exhibit) ; notice of filing. (sb) [Entry date 11/17/92]

11/16/92	432	LETTER to Magistrate Judge Bernard Weisberg from A. David Silver dated 11/13/92 regarding exhibit (Attachment). (sb) [Entry date 11/17/92]
11/23/92	433	REPLY MEMORANDUM by plaintiff Lincoln Natl Life in opposition to Silver's claim for a jury trial; notice of filing. (sb) [Entry date 11/24/92]
11/30/92	434	MEMORANDUM by defendant A. David Silver in opposition to Lincoln's motion in limine to recondsider [sic] the court's order holding that Rico Treble damages claims are nonassignable. (sb) [Entry date 12/01/92]
11/30/92	435	MEMORANDUM by defendant A. David Silver in opposition to Lincoln's motion in limine to bar the testimony of defendant's expert witness; notice of filing. (sb) [Entry date 12/01/92]
12/1/92	436	TRIAL MEMORANDUM by defendant A David Silver; notice of filing. (cmf) [Entry date 12/02/92]
12/17/92	437	MINUTE ORDER of 12/17/92 by Hon. Bernard Weisberg: Telephone conference held. Discovery and final pretrial order have been completed. All matters relating to the referral of this action having been completed this case is returned to Judge Nordberg for further proceedings. [sic] terminating case referral. Mailed notice. (sb) [Entry date 12/18/92]

Supreme Court, U.S.
FILED
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No. 97-349

In The

Supreme Court of the United States

October Term, 1996

A. DAVID SILVER,

Petitioner,

vs.

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, an Indiana Corporation, in its individual capacity and as assignee of the SANTA FE PRIVATE EQUITY FUND II, L.P., a New Mexico limited partnership,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STEVEN S. SHONDER
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24 pp

QUESTION PRESENTED

Respondent, The Lincoln National Life Insurance Company, disagrees that the Petition for a Writ of Certiorari (the "Petition") filed by A. David Silver ("Silver") states a question that will require this Court to resolve a conflict among the Circuits, or that will resolve this case. Silver's question is premised on an incorrect assumption. Pursuant to Fed. R. Civ. P. 38(b), a party must serve a jury demand within ten days after service of the last pleading directed to any issues triable to a jury to preserve its right to a jury trial. Silver's question incorrectly assumes what the "last pleading" was. The Seventh Circuit agreed with Silver that had his jury demand been timely, Rule 38(b) would have applied. However, that court held that the "last pleading" had been filed six months before Silver filed his jury demand.

STATEMENT PURSUANT TO RULE 29.6

The Lincoln National Life Insurance Company is wholly owned by Lincoln National Corporation, a publicly held corporation. The Lincoln National Life Insurance Company has no nonwholly owned subsidiaries.

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APPENDIX

Appendix A — Relevant Docket Entries 1a

Respondent, The Lincoln National Life Insurance Company ("Lincoln") respectfully requests that this Court deny A. David Silver's Petition.

STATEMENT OF THE CASE

The Statement of the Case provided by Petitioner, A. David Silver ("Silver"), does not set out all the facts material to the consideration of the question presented. This case arose out of the activities of defendants A. David Silver ("Silver") and ADS Partners, L.P. ("ADSP"), in connection with a venture capital limited partnership, the Santa Fe Private Equity Fund II ("SFPEF II"). On September 23, 1986, Lincoln, an investor of SFPEF II, filed its complaint alleging that Silver committed multiple acts of securities, bank, mail and wire fraud over a two-year period in furtherance of several schemes designed to save financially-troubled entities controlled by Silver and to shield Silver from personal liability.[1] ADSP and SFPEF II were also named as defendants. Lincoln filed an Amended Complaint containing substantially the same claims six days later, on September 29, 1986.

Silver was served with the Amended Complaint on October 16, 1986. On November 17, 1986, Silver, by his counsel, Altheimer & Gray, moved for an extension of time to answer or otherwise plead. Also on November 17, 1986, Silver filed a motion to transfer or dismiss Count IV, claiming that Count IV was not brought within the applicable statute of limitations. Count IV of the Amended Complaint was a claim for rescission brought under the Illinois Securities Act. 815 ILCS 5/2.1, *et seq*. The issues raised in Count IV are identical to the issues

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1. Excerpts of the docket sheet from the United States District Court for the Northern District of Illinois showing the relevant docket entries are included at App. A at p. 1a.

raised in Count III, brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j)(b). On December 1, 1986, Silver filed his Answer to Counts I, II, III and V of Lincoln's Amended Complaint. Silver did not demand a jury within 10 days of the filing of this Answer.

Silver's motion to dismiss Count IV was denied on January 13, 1987. Defendant SFPEF II then filed an untimely counterclaim by permission on February 4, 1987. That counterclaim did not contain a jury demand. [2]

On May 21, 1987, Silver, by his new lawyers, Chadwell & Kayser, filed an Answer to Count IV of the Amended Complaint. That Answer did not contain a jury demand. Silver then filed an untimely compulsory counterclaim on June 1, 1987. That Counterclaim, bearing the notation "JURY TRIAL DEMANDED" on its face, also contained the notation "COUNTERCLAIMANTS SILVER AND ADSP DEMAND TRIAL BY JURY" on the final page.

On August 25, 1988, Lincoln filed a Second Amended Complaint. This Complaint added RICO causes of action and added new defendants. When Silver filed his Answer to the Second Amended Complaint, he was represented by the law firm Sachnoff Weaver & Rubenstein, Ltd. Thus, Silver was represented by counsel at all the critical pleading stages. He did not file a jury demand within 10 days of filing this Answer.[3]

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2. In February 1987, SFPEF II's limited partners voted unanimously to remove ADSP and Silver as its general partners and SFPEF II was placed into receivership. Later that year, all of SFPEF II's claims against Silver and ADSP were assigned to Lincoln.

3. The new defendants did not answer the Second Amended Complaint. They entered into a settlement agreement with Lincoln and were dismissed from the case.

Lincoln was granted summary judgment on Silver's Counterclaim on October 31, 1991. The parties disagreed as to whether the case would be tried to a jury. Shortly before the Final Pretrial Order was entered, Silver asked for and was given leave to file a brief as to why the case should be tried by a jury. The District Judge treated Silver's November 1992 request as a motion for a jury trial and denied the motion on July 15, 1993.

In denying the motion for a jury trial, the District Court ruled that the last pleading directed to any issues triable by a jury was Silver's Answer filed December 1, 1986. Thus, the court held that, pursuant to Fed. R. Civ. P. 38(d), Silver waived his right to demand a jury by failing to demand one not later than 10 days after service of the Answer.

The case was tried by the court beginning August 16, 1993. After two consecutive weeks of trial, during which extensive evidence was taken, the District Court accommodated Silver by granting two nearly month-long continuances to present additional evidence. Detailed proposed findings of fact and conclusions of law were filed by the parties. On September 29, 1995, the District Court entered a Memorandum Opinion and Order granting judgment to Lincoln and against Silver and ADSP on all counts. Judgment was entered on April 9, 1996. Silver then appealed to the Court of Appeals for the Seventh Circuit, which affirmed the judgment in an unpublished, per curiam opinion dated May 15, 1997. *Lincoln National Life Insurance Company v. Silver*, 1997 U.S. App. LEXIS 11926. Silver filed a timely Petition for Rehearing En Banc that was denied on June 9, 1997.

REASONS FOR DENYING THE WRIT

I.

SILVER'S PETITION SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT DECISION TURNS ON ITS OWN FACTS AND WILL AFFECT FEW OTHER THAN THE LITIGANTS.

Putting aside the fact that Silver's claim of a conflict between the Circuits is not correct, this case simply does not merit review by this Court. The Seventh Circuit's unpublished, per curiam Order in this case has no value as precedent in the Seventh Circuit. Seventh Circuit Rule 53. Moreover, the Seventh Circuit expressly decided the question presented on the basis of the "unique facts presented by this case". *Lincoln*, 1997 U.S. App. LEXIS 11926, p. 9. Unique facts preclude a conflict.

Silver incorrectly suggests that *Daniel International Corp. v. Fischbach & Moore*, 916 F.2d 1061 (5th Cir. 1990), conflicts with the Seventh Circuit's ruling in this case. *Daniel* actually supports the Seventh Circuit's ruling because it holds that a party who fails to file a jury demand within 10 days of the last pleading waives the right to a jury trial under Rule 38. *Id.* at 1064. *Daniel* did uphold the defendant's right to a jury trial — noting a lack of disruption to the district court's calendar and the lack of prejudice to the plaintiff — under Fed. R. Civ. P. 39(b). *Id.* at 1065.[4]

The decision to grant or deny a motion for a jury trial under

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4. Rule 39(b) provides that "notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury on any or all issues." Fed. R. Civ. P. 39(b).

Rule 39(b) is discretionary and depends on the facts of each case. *Ma v. Community Bank*, 686 F.2d 459, 470 (7th Cir. 1982), *cert. denied*, 459 U.S. 962 (1982); *Daniel* at 1064 (listing factors relevant for consideration). Nothing in *Daniel* shows that that Court would decide this case any differently than the Seventh Circuit did.[5]

II.

SILVER'S PETITION SHOULD BE DENIED BECAUSE HIS QUESTION PRESENTED RELIES ON AN INCORRECT ASSUMPTION, WHICH WAS REJECTED BY THE SEVENTH CIRCUIT.

Silver's statement of the question presented assumes that his jury demand was filed within 10 days of the last pleading directed to any issues triable by a jury. Silver requests the issuance of a writ of certiorari to review the question of:

> Whether a Constitutional right to a trial by jury should be granted on all issues triable of right to a jury, if the jury demand is contained in a compulsory counterclaim filed within 10 days of the last pleading (which pleading is a reply, extended by the court, to one count out of several) is filed prior to an amended pleading that alleges RICO claims, seeking statutory damages, is a general demand, is continually on the Docket, is

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5. Further, Silver's jointly liable co-defendant in this case, ADS Partners, L.P. ("ADSP") never appealed the judgment of the District Court. The judgment is thus final as to ADSP. Because Silver was the general partner of ADSP he is personally liable for any amounts unsatisfied by ADSP. Therefore, any relief granted to Silver by this Court would be moot.

> never moved to be stricken, is not prejudicial to respondent, and is never waived.

Petition at i. An answer to this question will not resolve the issue decided by the Seventh Circuit. The question before the Seventh Circuit was whether, in fact, the jury demand was filed within 10 days of the last pleading. Silver's hypothetical question was already answered by the Seventh Circuit in its Order:

> Silver relies heavily on the proposition that a general jury demand must be construed as a jury demand as to all issues triable by a jury. As a general matter, he is quite correct in this statement of the law. . . . Had Silver's June 1, 1987 jury demand been timely, the Rule would plainly have had some effect; however, there is no authority for the proposition that an untimely jury demand constitutes a valid jury demand for all issues so triable including those for which the right to a jury trial has been waived by virtue of the defendant's failure to timely demand such a trial.

Lincoln at U.S. App. LEXIS 11926, p. 10. Silver does not (and cannot) argue that in answering this question the Seventh Circuit's Order conflicts with the decisions of other Circuits. [6]

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6. Fed. R. Civ. P. 38 states in relevant part:

> (b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action

(Cont'd)

III.

SILVER'S PETITION SHOULD BE DENIED BECAUSE THE CASES CITED BY SILVER DO NOT DEMONSTRATE A CONFLICT AMONG THE CIRCUITS AS TO THE QUESTION WHICH RESOLVED THIS CASE.

The cases cited by Silver are not in direct conflict with the Seventh Circuit's holding in this case. All are consonant with the proposition that the issue contemplated by Rule 38(b) is one of fact and an issue of fact exists when a factual allegation is denied. Silver incorrectly claims that the decision in *Bentler v. Bank of America*, 959 F.2d 138 (9th Cir. 1992), is in direct conflict with the Seventh Circuit's ruling. The *Bentler* court held that where defendants are jointly liable on a cause of action, the last pleading directed to any issues triable by a jury is the answer filed by the last jointly liable defendant. *Id.* at 141.[7]

United States v. Anderson, 584 F.2d 369 (10th Cir. 1978), another case Silver claims is in direct conflict with the Seventh

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(Cont'd)

> and not later than 10 days after the service of the last pleading directed to such issue . . .
>
> (d) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury . . .

Fed. R. Civ. P. 38(b) and (d).

7. There was no counterclaim in *Bentler*. In that case, the court merely analogized to situations involving compulsory counterclaims. *Bentler* at 141. *Bentler* did not rule on the issue decided by the Seventh Circuit.

Circuit's decision, also does not decide the question presented to the Seventh Circuit. In that case, the defendant filed a counterclaim *with his answer* and the plaintiff filed a motion to dismiss it. While the motion was still pending, the defendant filed a jury demand. The court upheld the jury demand, ruling that the issues would not be joined and the time to file a jury demand under Rule 38(b) would not begin to run until the reply to the counterclaim itself was filed. *Id.* at 372. Another case relied upon by Silver, *Dasho v. Susquehana Corporation*, 461 F.2d 11 (7th Cir. 1972), also presented a question involving a counterclaim filed with the answer. In *Dasho*, the court held that a reply to the counterclaim serves as the last pleading even if the reply is untimely filed. *Id.* at 22.

These cases do not conflict with the holding of the Seventh Circuit: that Silver's Answer, which did not include a counterclaim, addressed all material allegations of the complaint and was the last pleading directed to the issues because his motion to dismiss merely asserted an affirmative defense. As the Seventh Circuit stated:

> As this Court has observed on many occasions, the Rules of Civil Procedure do not require plaintiffs to separately denominate counts in their complaints, with each such count corresponding to a particular statute or legal theory. (citation omitted). Here the fact that Silver did not specifically answer the particular allegations contained in a separately denominated count (Count IV) until six months after he had answered materially identical allegations was entirely an incidental consequence of the manner in which Lincoln structured its complaint. Thus if Lincoln had simply set forth all of its

> factual allegations and concluded with an appropriate prayer for relief, Silver would have answered all such allegations and this artificial splitting of the answer would never have occurred. . . . On the unique facts presented by this case, we conclude that all issues raised in Lincoln's complaint were joined by Silver's December 1, 1986, answer. Therefore, a jury demand contained in his counterclaim, filed six months later, was untimely as to those issues and was properly denied.

Lincoln, 1997 U.S. App. LEXIS 11926, pp. 9-10. Thus, Silver has not demonstrated a conflict among the circuits. Indeed, consonant with Silver's authorities, the Seventh Circuit recognized that Silver's jury demand would have applied to all jury issues raised in the complaint, if only he had filed it on time.

Further, Silver's question to this Court does not contemplate that his Counterclaim was the last pleading directed to any issues triable by a jury. Even if he had, the cases cited by Silver on this point create no conflict because they are readily distinguishable on their facts. Silver filed his counterclaim six months after his original answer — not with his answer as required by the rules. Fed. R. Civ. P. 12(b).

The Seventh Circuit followed the well-established precedent that "under Rule 38 amendments or supplemental pleadings do not extend the time for making a demand for jury trial except as to new issues raised by the new pleadings." *Communications Maintenance, Inc. v. Motorola, Inc.*, 761 F.2d 1202, 1208 (7th Cir. 1985). Thus, a subsequently filed counterclaim that contains

a jury demand is only timely with respect to new claims raised in that supplemental pleading and not to previously answered issues. *Id.* As Silver acknowledged during oral argument before the Seventh Circuit, his counterclaim raised no new issues. Even if it had raised new issues, because Silver's counterclaim was dismissed, none remained for a jury when the case was tried.

IV.

LINCOLN'S SECOND AMENDED COMPLAINT DID NOT REVIVE SILVER'S RIGHT TO A JURY TRIAL.

Silver suggests that Lincoln's Second Amended Complaint is relevant to the question in his Petition and relies on *Rosen v. Dick*, 639 F.2d 82 (2nd Cir. 1980). However, *Rosen* and its progeny concerned the extent to which other parties could rely upon a timely jury demand. And contrary to Silver's assertion, some dicta in *Rosen* supports the denial of this Petition. The *Rosen* court found that a jury demand as to subsequent pleadings covers only new issues raised in those pleadings and not earlier issues for which the time to request a jury has passed. *Rosen*, 639 F.2d at 91, *see also Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045, 1050 (9th Cir. 1974) (presentation of a new theory of recovery, especially if based on the same facts, does not constitute the presentation of a new issue); *Richardson Greenshields Securities, Inc. v. Mui-Hin Lau, et al.*, 693 F. Supp. 1445, 1457- 1459 (S.D.N.Y. 1988) (amendments to the pleadings revive the right to a jury trial only if they involve new issues or change the original issues).

Silver argues that statutory damage cases *must* be decided by a jury according to United States Supreme Court precedent, citing, among other cases *Tull v. United States*, 481 U.S. 412 (1987), *Curtis v. Loether*, 415 U.S. 189 (1974) and *F.W.*

Woolworth Co. v. Contemporary Arts, 344 U.S. 228 (1952).[8] Petition at 19-22. *Tull* and *Curtis* merely hold that the right to a jury trial extends to the causes of action arising under, respectively, the Clean Water Act, 33 U.S.C. § 1251, *et seq*, and Section 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612.[9] The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved." It does not *require* that all cases be tried by a jury. *Burns v. Lawther*, 53 F.3d 1237, 1240 (11th Cir. 1995) (Seventh Amendment right to a civil jury is not absolute and may be waived); *see also LaMarca v. Turner*, 995 F.2d 1526, 1544-45 (11th Cir. 1993), *General Tire & Rubber Co. v. Watkins*, 331 F.2d 192, 197 (4th Cir. 1964), *cert. denied*, 377 U.S. 952 (1964). A party requesting a jury trial must still make a timely demand. As the District Court and Seventh Circuit found below, Silver failed to make a timely request for a jury.

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8. Silver's citation to *F.W. Woolworth* to support his Petition is wrong. The right to a jury trial was not an issue in that case. Further, the quotation ascribed to that case is not in the published opinion.

9. In *Tull v. United States*, the question was whether the Seventh Amendment guaranteed the *right* to a jury trial in an action arising under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* 481 U.S. at 414. This Court held that such a cause of action is analogous to an action in debt within the jurisdiction of the English courts of law prior to the enactment of the Seventh Amendment. Thus, "the Seventh Amendment required that petitioner's *timely demand for a jury trial* be granted." *Id.* at 427 (emphasis added).

Similarly, in *Curtis v. Loether* the question was whether the Seventh Amendment applies "to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." This Court held that "the Seventh Amendment entitles either party to *demand a jury trial* in an action for damages in federal court under § 812." 415 U.S. at 192 (emphasis added).

That RICO allows for the recovery of statutory damages does not trump the fact that Silver failed to timely request a jury trial.

CONCLUSION

The Seventh Circuit's ruling, affirming the District Court's denial of Silver's motion for a jury trial, does not create a direct conflict among the Circuits upon the question presented. Silver's petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — RELEVANT DOCKET ENTRIES

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY v. A. DAVID SILVER
DOCKET

DATE	NR	PROCEEDINGS
10/01/86	5	Filed 09/29/86: Amended Complaint of Plaintiff. Issued 09/29/86 alias summons and 4 copies
10/24/86	9	Filed 10/22/86: Return of Service of Summons and Complaint returned SERVED as to A. David Silver by certified mail receipt #P256 150 660 on 10/16/86.
	10	Filed 10/22/86: Return of Service of Summons and Complaint returned SERVED as to ADS PARTNER L.P. by certified mail receipt #P256 150 659 on 10/16/86.
	11	Filed 10/22/86: Return of Service of Summons and Complaint returned SERVED as to Santa Fe Private Equity Fund II by certified mail receipt #P 256 150 658 on 10/16/86.
11/17/86	16	Minute order of 11/13/86: Plaintiff given leave to file motion for preliminary injunction. Defendant to file answering memorandum and motion to transfer by November 28, 1986. Plaintiff's reply/answering memorandum to be filed by December 12, 1986. Final reply to be filed by defendant on December 19,

Appendix A

DATE	NR	PROCEEDINGS
		1986. Status hearing held and continued to January 12, 1987 at 9:30 a.m. — GETZENDANNER, J. Notices mailed 11/17/86.
11/21/86	19	Filed 11/18/86: Appearance of Robert K. Blain and David O. Toolan for defendants.
11/21/86	20	Filed 11/18/86: Rule 39 Affidavit of Robert K. Blain.
11/21/86	21	Filed 11/18/86: Rule 39 Affidavit of David O. Toolan.
11/21/86	23	Minute order of 11/19/86: Defendants Silver, ADS Partners and Santa Fe Private Equity Fund II are given to December 1, 1986 to answer certain counts of the Amended Complaint. Previously set briefing schedule to stand on the motion to dismiss transfer. — GETZENDANNER, J. Notices mailed 11/21/86.
11/21/86	24	Filed 11/17/86: Defendant's notice of motion and motion for extension of time to answer.
	25	Filed 11/17/86: Defendant's notice of motion and motion to dismiss
12/03/86	26	Filed 12/01/86: Defendants' notice of filing; Memorandum in support of motion to dismiss

Appendix A

DATE	NR	PROCEEDINGS
		count IV and in support of motion to transfer venue; Exhibit A; Attachment.
12/04/86	27	Filed 12/01/86: Defendants' A. David Silver, ADS Partners, L.P., and Santa Fe Private Equity Fund II, L.P.'s ANSWER to amended complaint; Notice of filing
01/15/87	42	Minute order of 01/13/87: Defendants' motion to transfer and to dismiss count IV are denied without prejudice to renewal at a later date on a fuller factual record. For further details see order attached to the original minute order form. — GETZENDANNER, J. Notices mailed 01/15/87
MN	43	Enter order of 01/13/87: Memorandum opinion and order.
01/30/87	44	Minute order of 01/26/87: Defendant Santa Fe Private Equity Fund II given to February 4, 1987 to file counterclaim. — GETZENDANNER J. Notices mailed 01/30/87.
02/05/87	51	Filed 02/04/87: Notice of Filing; COUNTERCLAIM w/Exhibit A attached.
04/21/87	56	Minute order of 04/20/87: Attorneys Robert Blain and David Toolan given leave to withdraw as counsel for defendants Silver,

Appendix A

DATE	NR	PROCEEDINGS
		ADS Partners L.P. and Santa Fe Private Equity Fund II, L.P. Defendants Silver and Sante Fe Private Equity Fund II, L.P. shall have retained new counsel by May 7, 1987 and the new counsel shall appear on May 7, 1987 at 9:30 a.m. Status hearing re-set for 07 May 87 at 9:30 a.m. Getzendanner, J.
05/08/87	62	Minute order of 05/07/87: Michael Connelly, Joseph Giffin and Mary Gihooly given leave to substitute as counsel for defendants A. David Silver and ADS Partners. Counsel given leave to file their appearances. Defendants' motion for protective order regarding the deposition of Kyle Lefkoff heard. Defendants A. Silver ADS Partner and Santa Fe Private Equity Fund given to May 21, 1987 to answer count 4. Status hearing held and continued to 1 July 87 at 9:30 a.m. Getzendanner, J.
05/22/87	69	Filed 05/21/87: Notice of filing; ANSWER of defendants A. David Silver and ADS Partners, L.P. to Count IV of the Amended Complaint.
05/22/87	70	Minute Order of 05/22/87: Defendants A. David Silver and ADS Partners motion for an extension of time to June 1, 1987 to file counterclaims is granted. Getzendanner, J.
05/22/87	71	Filed 05/20/87: Notice of motion; Motion of

Appendix A

DATE	NR	PROCEEDINGS
		defendants for extension of time to file counterclaims.
06/03/87	72	Filed 06/01/87: Defendants notice of filing; COUNTERCLAIM of defendants-counterclaimants A. David Silver and ADS Partner, L.P.; Jury demand; Exhibit A.
08/26/88	129	Filed 08/25/88; SECOND AMENDED COMPLAINT.
09/22/88	141	Minute order of 09/21/88: Court grants Sarah R. Wolff, David J. Meadow and Charles J. Ryan leave to file their substitute appearances for defendants A. David Silver and ADS Partners replacing Michael Connelly, Joseph Giffin and Mary C. Gilhooly of Chadwel & Kayser. Nordberg, J. Mailed notice 09/22/88.
09/22/88	143	Filed 09/21/88. Appearance of Sarah R. Wolff., Charles J. Ryan, and David R. Medow as substitute counsel for defendants A. David Silver and ADS Partners.
10/25/88	162	Filed 10/24/88: Defendant A. David Silver's notice of filing; ANSWER TO SECOND AMENDED COMPLAINT.